(5)

No. 95-1826-CFX Title: D. L. Thomas, et ux., Petitioners
v.
American Home Products, Inc., et al.

Docketed: May 9, 1996 Court: United States Court of Appeals for the Eleventh Circuit

Entry	Date	Proceedings and Orders
	May 9 1996	Petition for writ of certiorari filed. (Response due June 8, 1996)
	Jun 6 1996	Brief of respondents American Home Prooducts, Inc. and Boyle-Midway, Inc. in opposition filed.
	Jun 7 1996	Waiver of right of respondent Amazing Products, Inc. to respond filed.
	Jun 13 1996	Supplemental brief of petitioners D. L. Thomas, et ux. filed.
	Jun 19 1996	DISTRIBUTED. September 30, 1996
	Oct 7 1996	REDISTRIBUTED. October 11, 1996
	Oct 15 1996	Petition GRANTED. Judgment VACATED and case REMANDED for further consideration in light of Banks v. ICI Americas, Inc., 266 Ga. 607, 469 S.E. 2d 171 (1996). Concurring opinion by Justice Scalia. Dissenting opinion by the Chief Justice with whom Justice Breyer joins. (Detached opinion.)

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No. ____

In The

Supreme Court of the United States

October Term, 1995

D.L. THOMAS and HAZEL THOMAS,

Petitioners,

v.

AMERICAN HOME PRODUCTS, INC., BOYLE-MIDWAY, INC., and AMAZING PRODUCTS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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56 pp

QUESTIONS PRESENTED

1. Whether there can be a constitutionally valid denial of petitioner D.L. Thomas' right to equal protection of the laws pursuant to the 5th and 14th amendments of the constitution of the United States, by placing him into a class inferior to others by reason of his illiteracy?

2. Whether a United States Court of Appeals may decide State Court retroactivity questions, or should the Court of Appeals certify unsettled questions regarding the retroactivity or prospectivity of State Court laws to the highest State Court?

3. Whether any Court of Appeals may overrule sub silentio, or without issuing an opinion, controlling authority of the circuit, without doing so en banc?

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PETITION FOR WRIT OF CERTIORARI

D. L. and Hazel Thomas, Petitioners, pray for a writ of certiorari to review and reverse the judgment of the Court of Appeals for the 11th Circuit, entered in this case on February 9, 1996.

OPINIONS AND ORDERS BELOW

Summary judgment was granted against your petitioners in the Northern District of Georgia by Judge Owen Forrester in an unpublished opinion in this products liability case. (2a) An unpublished amendment to that order was filed October 8, 1993 (22a). Petitioners' appealed to the 11th Circuit, which affirmed, per curiam, on October 19, 1994. 39 F.3d 325. (1a) Inasmuch as the 11th Circuit neither addressed nor distinguished controlling 11th Circuit authority on the questions presented, petitioners filed a suggestion of rehearing (or hearing) en banc and petition for rehearing. That petition was supplemented by petitioners to present to the 11th Circuit controlling authority which had been issued by the Supreme Court of Georgia in the case of *Banks v. ICI Americas, Inc.*, 264 Ga. 732 (450 S.E.2d 671) (1994). The *Banks v. ICI Americas, Inc.* case answered, affirmatively for your petitioners, the certified question that petitioners had requested that the 11th Circuit present to the Supreme Court of Georgia for resolution.

On June 5, 1995 the suggestion of rehearing (or hearing) en banc and petition for rehearing was denied. 58 F.3d 642 (24a) The denial of the suggestion of rehearing

(or hearing) en banc and petition for rehearing was withdrawn on June 15, 1995 (26a) and the parties were ordered to brief the effect of *Banks v. ICI Americas, Inc.* on the present case. Despite the Supreme Court of Georgia having issued an opinion in the unrelated case of *Banks v. ICI Americas, Inc.* which petitioners believe answered the proposed certified question in petitioners suggestion of rehearing (or hearing) en banc and petition for rehearing, in favor of your petitioners, the 11th Circuit ultimately denied in an unpublished order the suggestion of rehearing (or hearing) en banc and petition for rehearing on February 9, 1996. (28a)

JURISDICTION

The trial court in the Northern District of Georgia entered summary judgment on September 30, 1993, and the 11th Circuit Court of Appeals ultimately denied the suggestion of rehearing (or hearing) en banc and petition for rehearing and rendered its final opinion on February 9, 1996. This petition for a writ of certiorari is filed within 90 days of that date. Jurisdiction is invoked under 28 U.S.C. §2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the 5th and 14th amendments to the Constitution of the United States are set forth in the appendix. (30a).

STATEMENT

A. FACTS

On February 8, 1990, Plaintiff, D. L. Thomas, was blinded when the contents of a floor drain violently exploded onto his head and face as he was attempting to place a drain cleaner into it. The drain cleaner he was using was Lewis Red Devil Lye (5/2/91 Depo. D. Thomas, p. 90). Lewis Red Devil Lye is marketed and distributed by Defendant, Boyle-Midway, Inc. (a/k/a Boyle-Midway Household Products, Inc.) (R. 3-64-"Ex. B", p. 2.) Unknown to Mr. Thomas, his co-workers, Tony White and Lawton Wofford, had used a liquid drain cleaner, Liquid Fire in the common drain system the day before. (Depo. White, p. 22; Depo. Wofford, p. 19.) Liquid Fire is manufactured, market and distributed by Amazing Products, Inc. (Affidavit of Duffy, Amazing Products, Inc.'s Summary Judgment Motion, R. 3-62-page-"Ex B" of document).

The day before Mr. Thomas was injured, he was working at the Fieldale Farms facility in Clarkesville, Georgia. At that time, Mr. Thomas and fellow employees were cleaning the building, rinsing the floor with a water hose. While cleaning the floor, they noticed that the water was not draining out of the various floor drains in the building (5/2/91 Depo. D. Thomas, p. 66). At that time, Mr. Thomas' supervisor, Lawton Wofford, went to the nearby Habersham Ace Hardware Store and purchased two cans of Lewis Red Devil Lye and one gallon of Liquid Fire (Depo. Wofford, p. 90).

Upon returning, Wofford and Tony White attempted to open the various drains. During this time, Mr. Wofford

and Mr. White used Lewis Red Devil Lye (a sodium hydroxide-base drain cleaner) and Liquid Fire (a sulfuric acid-based drain cleaner). While Mr. Wofford was using Lewis Red Devil Lye, some of the contents of the drain boiled back out of the water onto his hand (5/2/91 Depo. D. Thomas, p. 74). Mr. Wofford then washed his hands and left to go home (5/2/91 Depo. D. Thomas, p. 75). Mr. Thomas never saw Lawton Wofford or any other person with any drain cleaner, other than Lewis Red Devil Lye (5/2/91 Depo. D. Thomas, p. 70). The only person whom Mr. Thomas saw placing drain cleaner into the drain system was Lawton Wofford (5/2/91 Depo. D. Thomas, p. 71). Mr. Thomas had no knowledge that any drain cleaner other than Lewis Red Devil Lye was purchased until well after his injury took place (5/2/91 Depo. D. Thomas, p. 79). Mr. Thomas did not know that Liquid Fire had been used in any drain (5/2/91 Depo. D. Thomas, p. 87). He had seen Mr. Wofford add only a little Lewis Red Devil Lye in the drain (5/2/91 Depo. D. Thomas, pp. 122, 123). Furthermore, neither label warned of the danger of explosion, or the dangers of explosion when mixing drain cleaners, by words or pictures, and thus did not put Mr. Thomas on notice to inquire about the presence of or use of other drain cleaners in the drain. (See Labels, R. 3-63-"Ex. B", R. 3-62 "Ex. A" – "Ex. B" is missing hang tag.)

On February 8, 1990, Mr. Thomas arrived at work at approximately 6:10 a.m. (5/2/91 Depo. D. Thomas, p. 89). The drain at issue appeared unclogged with only a little residue of water in it, thereby raising the inference that, despite the main line having been previously cut, the contents of the drain were still obviously leaching into the soil. He attempted to place approximately two and a

half tablespoons of Lewis Red Devil Lye into the floor drain. Since the can only contained two and a half tablespoons of lye at that time, be began to pour the contents directly from the can (5/2/91 Depo. D. Thomas, p. 90). He did not use the rest of the can since the contents of the floor drain exploded immediately as he started adding the Lewis Red Devil Lye (5/2/91 Depo. D. Thomas, p. 88). Mr. Thomas did not use Lewis Red Devil Lye contrary to the label directions, since he attempted to place approximately two and a half tablespoons of Lewis Red Devil Lye into the floor drain (5/2/91 Depo. D. Thomas, p. 90). The additional amount of Lewis Red Devil Lye added to the drain system was not contrary to the can's directions, since the directions call for a repeat application if the drain is still closed. (R. 3-63-"Ex. B".)

When the contents of the floor drain exploded back onto Mr. Thomas, it covered his face and head (5/2/91 Depo. D. Thomas, p. 88). In fact, the contents exploded back so quickly that Mr. Thomas did not have an opportunity to move the can (5/2/91 Depo. D. Thomas, p. 101). The force of the explosion was so strong that it blew the cap off his head and covered his head and face, even though he was standing straight up, holding the can at arm's length and had his face turned (5/2/91 Depo. D. Thomas, p. 103, 104).

Charles Blake, expert retained by Amazing Products, Inc., examined the residue on the walls and ceiling of the room where Mr. Thomas was blinded (Depo. Blake, p. 68 line 5). From the residue only minor amounts of sulfuric acid was found (Depo. Blake, p. 129 line 5). The explosion could have been caused by mixing Lewis Red Devil Lye with the drain water or by the mixing of both chemicals

in the drain (Depo. Blake, p. 137 line 17). The cause of the explosion could have had nothing to do with sulphuric acid in the drain (Depo. Blake, p. 157 line 6). The explosion was caused by sodium hydroxide (Red Devil Lye) being poured into the drain water (Depo. Blake, p. 70 line 13). (Depo. Blake, p. 72 line 8). The mixing of sodium hydroxide and sulphuric acid together would not cause an explosion (Depo. Blake, page 77 line 9). Further confusing matters, and clearly showing that fact question remain that only a jury can sort out, AHP and B-M's expert E. C. Ashby has also earlier testified it is impossible to prove or disprove Plaintiff's injuries were caused by one product or the other. (R. 1-30-"Ex. A".)

Neither product label warned that the product would explode if mixed into a drain system that contained another drain cleaner, and neither label had pictorials showing the possibility of explosion or contraindicating the mixing of drain cleaners. The hand tag missing from the Liquid Fire bottle had a pictorial regarding mixing, but was not designed to be adequately affixed to the bottle and was missing when purchased. If Lawton Wofford had known that the combination of Lewis Red Devil Lye and Liquid Fire was an explosive mixture, as set forth in the Affidavit of Dr. Ashby (R. 3-63-"Ex. D".) he would not have used the two drain cleaners together (R. 4-76-Affidavit Wofford, ¶ 10). Since the two drain cleaners were on the same display, he did not think twice when making his purchase, and did not question whether they could be used together (R. 4-76-Aff. Wofford, ¶ 14). Still worse, the Liquid Fire bottle which Lawton Wofford purchased did not have a hang tag with its pictorial warnings (R. 4-76-Aff. Wofford, ¶ 12). Further, neither he

nor Tony White, another Fieldale employee, knew that the two drain cleaners were explosive in nature (R. 4-76-Aff. White ¶ 8; Aff. Wofford ¶ 8).

Both Lewis Red Devil Lye and Liquid Fire were inadequately labeled, and this inadequacy led to this tragic incident. The use of both Lewis Red Devil Lye and Liquid Fire was foreseeable misuse (Depo. Abraham, p. 222). D. L. Thomas and others using the products could have been adequately warned through the use of pictorials to make it alarming to the user to ensure that they read the label or have it read to them (Depo. Tanyzer, pp. 157, 159). This would be more apt to place the user on notice that this was a dangerous product (Depo. Tanyzer, pp. 160, 162).

Mr. White thought that poison was the only hazard associated with the product, and thereby thought that the warning label itself was concerned simply with poison (R. 4-76-Aff. White, ¶ 9). The front label has nothing to indicate the danger of explosiveness to bring the user to a level of awareness of precisely what can happen (Depo. Tanyzer, p. 177). The efficiency of pictorial warnings is borne out by the fact that both White and Wofford knew that the contents were poisonous, so they obviously noted the pictorials. (R. 4-75-Aff. White, ¶ 9; Aff. Wofford, ¶ 9.)

Prior to his injury, Thomas' wife, Hazel Thomas, had read a LRDL label to him (5/2/91 Depo. of D. Thomas, p. 25). He knew not to use it with "hot water"; to use three tablespoons; and to keep his face away from the can and drain at all times (5/2/91 Depo. of D. Thomas, pp. 27, 31, 120, 145). He did not know that LRDL would explode back and burn his eyes and skin, since he does not

remember his wife ever telling him that LRDL could explosively blow back onto him (5/2/91 Depo. of D. Thomas, pp. 31, 144). If Mr. Thomas had been adequately warned about the explosive nature of LRDL, he would have taken proper safety precautions (R. 4-76-Aff. D. Thomas). In the past, he has followed such safety precautions (5/2/91 Depo. of D. Thomas, p. 118). However, Mr. Thomas was not apprised of the fact that Lewis Red Devil Lye could explode, and burn his eyes and skin as it did (5/2/91 Depo. D. Thomas p. 31), even though Ms. Thomas read the label to him, because the label contained no warning of explosion, either in words or, more importantly for the foreseeable illiterate user Mr. Thomas, in pictures or symbols. (R. 3-63-"Ex. B & C.")

There has been expert testimony in this case that the formulations of Lewis Red Devil Lye and Liquid Fire are defective, since a lower percentage of sodium hydroxide and sulfuric acid would perform the same function and be a much safer formulation. Therefore the formulations of these products are defective, and inherently dangerous, since, with today's technology, (as opposed to the technology of 1975), a safer formulation of chemical drain cleaner could be made to perform the same job, according to Dr. Carl Abraham. (See depo. of C. Abraham, p. 256-257.)

The labels on Lewis Red Devil Lye and Liquid Fire were inadequate and deficient in a myriad of ways, but most significantly for the purposes of this petition for writ of certiorari, the labels did not contain pictorial warnings to advise others that a product was already in the drain system, and neither label contained a pictorial warning of the explosive nature of the product.

B. PROCEDURAL HISTORY

As a result of D. L. Thomas' injuries, he filed a complaint and amended complaint, ultimately bringing in the three defendants presently before this court.

Each defendant moved for summary judgment, which was granted by the trial court. The trial court at page 12 of its opinion (13a) found that "[p]laintiff is functionally illiterate. Therefore, no matter how adequate the written warning is to the normal consumer, the warning would be ineffective as to Plaintiff." This finding is the basis for plaintiff's equal protection claim, and was timely and properly raised by your petitioners in their 11th Circuit brief and their contention that since an illiterate user is foreseeable, pictorial warnings should have been provided.

The basis for federal jurisdiction in the Northern District of Georgia was diversity. The trial court's further finding that Mr. Thomas was unaware of any other drain cleaner in the system and thus any deficiency in the defendants' products warning labels did not cause his injuries, (see Judge Forrester's order at page 16 (17a)) is also erroneous based on the fact that the drain system was at least leaching into the soil and thus appeared to be draining (see page 4). Further, the trial court ignored here the possibility that one chemical, the other, or both could have caused the explosion. (See pages 5-6). The 11th Circuit Court of Appeals affirmed that judgment per curiam (39 F.3d 325) (1a). The 11th Circuit Court of Appeals initially denied rehearing and suggestion of rehearing en banc on June 5, 1995 (58 F.3d 642) (5a) then recalled that order on June 15, 1995 (26a). It was in this recall of the

denial of the petition for rehearing that the Court requested briefs on the effect of *Banks v. ICI Americas*, 264 Ga. 732. Ultimately the 11th Circuit Court of Appeals denied the suggestion of rehearing or hearing en banc and appellants' petition for rehearing on February 9, 1996 (28a).

REASONS FOR GRANTING THE PETITION

1. There can not be a constitutionally valid judicial determination that illiteracy is a proper basis for denying petitioners' right to equal protection of the laws.

2. Petitioner has been deprived of his right to a trial if this Court of Appeals' determination of an issue of prospectivity or retroactivity, under *Banks v. ICI Americas, Inc.*, is determined without certifying the question to the Supreme Court of Georgia.

3. This 11th Circuit opinion conflicts with other 11th Circuit opinions based on similar facts.

The orderly administration of justice is frustrated and the integrity of the judicial system is potentially compromised, when Courts of Appeals, whether State or Federal, issue opinions without explanations, and issue opinions ignoring or overruling sub silentio controlling authority without either addressing or attempting to distinguish controlling authority, and without, in the case of the Federal Courts, presenting the issue to the court en banc to decide if it should be overruled.

I. THERE CAN NOT BE A CONSTITUTIONALLY VALID JUDICIAL DETERMINATION THAT ILLITERACY IS A PROPER BASIS FOR DENYING PETITIONERS' RIGHT TO EQUAL PROTECTION OF THE LAWS.

The trial court found in this case "it is imminently foreseeable that a user of either Lewis Red Devil Lye or Liquid Fire would be illiterate. See *Zigler v. E.I. Dupont de Numours & Co.*, 53 N.C. App. 147, 155-56, 280 S.E.2d 510, 516 (1981), *review denied*, 304 N.C. 393, 285 S.E.2d 838 (1981); *Power*, 149 Misc. 2d at 970, 568 N.Y.S. 2d at 676."

By granting summary judgment despite this, the trial court has effectively held that an illiterate user is not entitled to simple pictorial warnings of the dangers of the products he is using, and has therefore held that it is permissible under state products liability law, to create a class – those foreseeable illiterate users – against whom it is permissible to discriminate because of their disability.

Further, "[a]ll standards of equal protection applicable to the states through the Fourteenth Amendment are also applicable to the federal government through the Fifth Amendment . . . Although the equal protection guarantee is not specific, it has been implied into the Due Process Clause of the Fifth Amendment." (Citations omitted.) *Morris v. Richardson*, 348 F.Supp. 494, 499 (1972).

Thus, whether the class discrimination against the illiterate has been read into Georgia products liability law by a state or federal judge interpreting these statutes is immaterial. "The Due Process Clause of the Fifth Amendment prohibits the federal government from creating statutes which establish arbitrary discrimination having no

rational basis in legitimate governmental purposes." *Morris v. Richardson, supra.*

"[T]he Equal Protection Clause . . . 'announces a fundamental principle: the state must govern impartially. General rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with this principle.' *New York City Transit Authority v. Beazer,* 440 U.S. 568, 587, 59 L. Ed. 2d 587, 99 S. Ct. 1355." *Jones v. Helms,* 452 U.S. 412, 423, 69 L. Ed. 2d 118, 128, 101 S. Ct. 2434, ___. Judge Forrester's interpretation of Georgia State law allowing unfair discrimination against the illiterate Mr. Thomas is clearly partial and applies differently to illiterate as opposed to literate users. Therefore the 11th Circuit's ruling and order must be reversed, inasmuch as it does not apply Georgia product liability law "evenhandedly to all persons within the jurisdiction."

II. PETITIONER HAS BEEN DEPRIVED OF HIS RIGHT TO A TRIAL IF THIS COURT OF APPEALS' DETERMINATION OF AN ISSUE OF PROSPECTIVITY OR RETROACTIVITY, UNDER *BANKS V. ICI AMERICAS, INC.*, IS DETERMINED WITHOUT CERTIFYING THE QUESTION TO THE SUPREME COURT OF GEORGIA.

The 11th Circuit Court of Appeals has concluded that *Banks v. ICI,* 264 Ga. 732 (450 S.E.2d 671) would not apply to the injuries involved in this case, based on a footnote in *ICI v. Banks,* 218 Ga. 237 (460 S.E.2d 797, 798 n.1). The Georgia Supreme Court in *Banks v. ICI,* adopted a risk-utility analysis balancing test which would moot even the trial court's erroneous factual determinations in this case,

if under a risk-utility analysis, a jury determined that the use of these chemicals for the purpose intended was inherently dangerous, and they should not have been marketed or sold for this application in the first place.

As footnote one implicitly notes, the Supreme Court of Georgia has yet to make any analysis under *Flewellen v. Atlanta Casualty Company,* 250 Ga. 709, 712 (300 S.E.2d 673) with regard to retroactivity, and the only retroactivity issue decided was in *favor* of retroactivity, as to *Banks v. ICI* itself. Further cited in the pertinent footnote is *General Motors Corp. v. Rasmussen,* 255 Ga. 544, 545-546 (340 S.E.2d 586) (1986) noting that retroactive application of judicial decisions in civil cases is the *usual* rule, though a law changing decision will generally be applied prospectively under the *Flewellen* test. However, this is "where the decision changes established law, and prospective application would avoid imposing 'injustice or hardship' on those who justifiably relied on the prior rule, without unduly impairing the 'purpose and effect' of the new rule." As the Court of Appeals has noted, none of this analysis has taken place in the Georgia Supreme Court with regard to *Banks v. ICI* and its new rule, and petitioners suggested that rather than concluding that *Banks v. ICI* would not apply to the injuries involved in this case based on a footnote in the Georgia Court of Appeals, that the 11th Circuit instead certify the question of retroactivity and its application in this case, to the Georgia Supreme Court, where this issue could be best and most fully addressed. See *Tolbert v. Murell,* 253 Ga. 566 (322 S.E.2d 487) (1984), as well as *Rasmussen.* The Supreme Court of Georgia in *Banks v. ICI Americas* adopted a risk-utility analysis balancing test, concluding

"that the better approach is to evaluate design defectiveness under a test balancing the risks inherent in a product design against the utility of the product so designed." *Banks v. ICI* at page 735. Petitioners have contended that the use of pure or near 100% concentrated chemicals in these products was an unsafe formulation, and that in the face of expert testimony in this case that there are safer formulations of both chemicals involved in this case, it should be a jury question as to whether the near pure concentrations of the volatile chemicals involved in the case were therefore inherently dangerous, inasmuch as expert testimony has determined that it is unnecessary to use such strong concentrations to achieve the result intended. (See page 8.) Even prior to the Georgia Supreme Court's opinion in *Banks v. ICI Americas*, your petitioners in their suggestion of rehearing (or hearing) en banc and appellants' petition for rehearing suggested to the 11th Circuit that this very question be forwarded to the Georgia Supreme Court on a certified question as to whether or not *Center Chemical Co. v. Parzini*, 234 Ga. 868 (218 S.E.2d 580) (1975) would still be valid law 20 years later, when expert testimony revealed that there were safer than pure formulations of both chemicals. Petitioners feel that this question was answered in favor of petitioners less than one month after petitioners requested that the case be sent to the Georgia Supreme Court to be answered, when *Banks v. ICI Americas* was decided on December 5, 1994.

Petitioners suggest that the 11th Circuit should have thereafter sent this case to the Georgia Supreme Court on the retroactivity question referenced in the 11th Circuit's final order in this case, inasmuch as it should be the State

of Georgia Supreme Court where the issue of retroactivity could be best and most fully addressed. Petitioners therefore ask for the writ of certiorari to issue here to reverse the 11th Circuit decision in this case, and certify the retroactivity question to the Georgia Supreme Court for a definitive analysis and decision. In the alternative, petitioners request that this court directly certify this question to the Georgia Supreme Court for decision.

III. THIS 11TH CIRCUIT OPINION CONFLICTS WITH OTHER 11TH CIRCUIT OPINIONS BASED ON SIMILAR FACTS.

The general rule in Georgia is that the adequacy of the warning is an issue for the jury. *Watson v. Uniden Corporation of America*, 775 F.2d 1514. "Whether adequate efforts were made to communicate a warning to the ultimate user and whether the warning if communicated was adequate are uniformly held questions for the jury." *Stapleton v. Kawasaki Heavy Industries*, 608 F.2d 571. This is still clearly the law and clearly the binding precedent in the 11th Circuit and should be applied in this case.

Comparing the facts in *Watson v. Uniden* to the facts in the present case illustrates clearly why Mr. Thomas should go before a jury on his facts. Unlike Mr. Thomas, who was not adequately warned due to the lack of any pictorial warning on either of these products showing that it would explode, Shirley J. Watson got to a jury on her negligent failure to provide a warning claim, regarding a wireless phone set, despite the fact that she and her husband *read the instruction book* that went with the phone, her husband *explained the "stand-by/talk" switch*

procedure to his wife when he installed the phone, the handset *itself* had a sticker on its inside face which read *"CAUTION – LOUD RING.* Move switch to talk position before holding receiver to the ear", and finally Mrs. Watson *knew* she was supposed to move the switch when she answered the phone, but *simply forgot to do so.* Despite all of this, Shirley J. Watson got to a jury on her claim that there were inadequate warnings and that Uniden was responsible for her permanent hearing impairment, despite admitting she knew what she was supposed to do, having read the instructions, having had the procedure explained to her, the handset having a sticker right on it, and Ms. Watson admitting that she knew what she was supposed to do, but forgot to do so.

It was the task of the 11th Circuit *en banc* to depart from the binding precedents in this circuit of *Watson v. Uniden Corporation of America,* 775 F.2d 151 (11th Cir. 1985) (appeal from M.D. Ga.); *Rhodes v. Interstate Battery System of America,* 722 F.2d 1517 (11th Cir. 1984); *Stapleton v. Kawasaki,* 608 F.2d 571, 573 (1979), *modified on other grounds,* 612 F.2d 905 (5th Cir. 1980). Therefore if those cases were no longer binding precedent in the 11th Circuit, this should have been so declared by a full court, not by a panel without opinion. If a plaintiff as *admittedly* thoroughly warned as Shirley Watson gets her constitutionally provided day in court before a jury, so must Mr. Thomas, who was using a product with inadequate warnings, inadequately communicated.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review and reverse the judgment below. As to section II, petitioners request that this court either reverse and direct the 11th Circuit to certify the *Banks v. ICI* retroactivity question to the Georgia Supreme Court, or that this Court so certify that question directly to the Georgia Supreme Court.

Respectfully submitted,

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APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-9214

D. C. Docket No. 1:91-00100-CV-JOF

D. L. THOMAS;
HAZEL THOMAS,

Plaintiffs-Appellants,

versus

AMERICAN HOME PRODUCTS, INC.;
BOYLE-MIDWAY, INC.;
AMAZING PRODUCTS, INC.,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Georgia

(October 19, 1994)

Before EDMONDSON and BIRCH, Circuit Judges, and HILL, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. See Eleventh Circuit Rule 36-1.

"Costs taxed against plaintiffs-appellants."

Judgment Entered: October 19, 1994
For the Court: Miguel J. Cortez, Clerk

By: /s/ Matt Davidson
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

D. L. THOMAS and HAZEL THOMAS,	:	
Plaintiffs,	:	CIVIL ACTION NO. 1:91-CV-0100-JOF
vs.	:	
AMERICAN HOME PRODUCTS CORPORATION, et al.,	:	
Defendants.	:	

ORDER

(Filed 9-30-93)

This personal injury product liability action, sounding in negligence and strict liability, contends that Defendants' defective products were the proximate cause of an accident resulting in personal injuries and permanent blindness to Plaintiff D.L. Thomas. Mr. Thomas's injuries occurred after a violent eruption resulted from pouring Lewis Red Devil Lye into a drain system in order to unclog that system. Defendant Boyle-Midway, Inc., is the manufacturer of Lewis Red Devil Lye. At the time the injury to Plaintiff Thomas occurred, Boyle-Midway was the wholly-owned subsidiary of Defendant American Home Products Corporation. Defendant Amazing Products, Inc., is the manufacturer of another drain cleaner called Liquid Fire, which was also used in the attempt to unclog the drain system on the afternoon prior to the injury to Thomas. Plaintiff contends that Defendants' products were defective because they did not adequately

warn of the potential for serious violent eruption or explosion of their drain cleaners if mixed. Furthermore, Plaintiff argues that Defendants' products are inherently dangerous and defective as sold directly to the consumer public.

For the following reason, the court finds that summary judgment is appropriately granted to the Defendants as to all of Plaintiff's claims. Plaintiff's failure to warn claim fails because Plaintiff cannot show that any deficiency in the warning or means of communicating that warning were the proximate cause of Plaintiff's injuries, given that Plaintiff was illiterate and unaware that another potentially dangerous drain cleaner had been used in the drain system that Plaintiff was attempting to unclog. Plaintiff's ultrahazardous nature of products claim is barred by prior Georgia precedent holding that where adequate warnings are given, these products are not inherently dangerous and unfit for public use. Plaintiff's breach of warranty claims fail for lack of privity between the Plaintiff and the Defendants.

I. BACKGROUND

In the early morning of February 8, 1990, Plaintiff Thomas poured Lewis Red Devil Lye directly from the product's can into a clogged floor drain. The drain was located in a commercial building in Clarkeville, Georgia, owned by Fieldale Farms Corporation, Thomas's employer. The contents of the floor drain blew back into Thomas's face as he was pouring Lewis Red Devil Lye into the drain. As a result of this incident, Mr. Thomas

suffered serious burns to his face and was permanently blinded.

The drain system contained a floor drain, a shower drain, and a stand pipe drain, all approximately three to four feet apart from one another. These three drains connected together into one central pipe under the floor, and then drained outside the building. Years prior to Plaintiff's injury, when a ditch was being dug outside the building, the central drain pipe had been severed and permanently plugged with dirt when the ditch was backfilled. Plaintiff and the other Fieldale workers attempting to unclog the drains were unaware that the central pipe had been cut and permanently plugged outside the building.

The Lewis Red Devil Lye and Liquid Fire drain cleaners used in an attempt to unclog the drain system were purchased by Mr. J. Lawton Wofford, a Fieldale employee, at a local hardware store the afternoon before the injury to Thomas. Wofford purchased two twelve-ounce cans of Lewis Red Devil Lye and one gallon container of Liquid Fire. Lewis Red Devil Lye consists of 100% sodium hydroxide, better known as lye. Liquid Fire is composed of approximately 96% concentrated sulfuric acid. It is a fundamental chemical principle that the combining of sodium hydroxide, a base, with sulfuric acid, an acid, creates an extremely explosive mixture which, in a closed environment such as a drain, can cause the contents of the drain to "blow back" or erupt in a potentially violent reaction.

On February 7, 1990, at approximately 2:15 p.m., significant amounts of Lewis Red Devil Lye and Liquid

Fire were added to the three drains.[1] Mr. Thomas was completely unaware that Liquid Fire had been purchased or used in an attempt to unclog the drain system. Neither Wofford nor Thomas nor White read the warning labels on either of the Lewis Red Devil Lye or Liquid Fire products prior to using them on the drain system. On February 8, 1990, at approximately 6:20 a.m., Plaintiff Thomas poured the remainder of a can of Lewis Red Devil Lye into the floor drain at the Fieldale Building.[2] Immediately upon adding the Lewis Red Devil Lye to the floor drain, a violent reaction occurred.

Plaintiff Thomas did not read the Lewis Red Devil Lye warning labels or directions prior to using the product in the drain system. Mr. Thomas was functionally illiterate with only a third grade education at the time of the injury. Plaintiff could not write any words other than

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[1] Plaintiff Thomas states in his deposition testimony that he never saw Liquid Fire being added to the drain system, nor was he aware that Liquid Fire had been purchased to be used in unclogging the drain system. The deposition testimony of John Lawton Wofford indicates that both Tony White and D.L. Thomas were standing next to Wofford as he placed the Lewis Red Devil Lye and the Liquid Fire into the drain system. For summary judgment purposes the court will assume that Thomas was unaware of the Liquid Fire being added to the drain system because of Plaintiff's uncontradicted direct testimony that he was aware that Liquid Fire had been added to the drain system.

[2] Plaintiff believed that there were approximately two and a half tablespoons of Lewis Red Devil Lye remaining in the can when he started pouring the product into the drain directly from the can without measuring the amount of product added immediately prior to his injury. The exact amount of lye remaining in the can is unknown.

his name and could only recognize a small number of words, being unable to read a normal newspaper, magazine or letter. In addition, at no point on the day prior to Plaintiff's injury or on the morning of Plaintiff's injury, did either the Plaintiff or his co-workers read the label warnings or directions on either of the cans of Lewis Red Devil Lye or the container of Liquid Fire.

Prior to the accident at issue, Plaintiff had used Lewis Red Devil Lye approximately six times. Plaintiff had not read the warning label on the cans on any of these prior occasions, nor did he ask anyone to read the label to him. Plaintiff had, however, gotten his wife to read him the label of Lewis Red Devil Lye on one occasion approximately three years prior to his injury. Thomas could not recall whether his wife read the product's warning label or just the instructions as to how much lye was to be used in any given application. Thomas specifically remembered the amount of product to use in any single application, not to use Lewis Red Devil Lye with hot water, and to keep his face away from the can and the drain at all times when using Lewis Red Devil Lye. Thomas did not recall being informed that the product was poisonous, that it should not be used with other chemicals or drain cleaners, that protective gear should be warn [sic] when using the product, that if the product was not used properly it might splash back onto the user, or that the product could burn the user's skin and eyes. With regard to the use of other drain cleaners or the mixture of drain cleaners, Plaintiff did know that it was unsafe to mix Saniflush and Draino, but he did not know why it was unsafe, nor did he know how he was aware that it was unsafe to mix these products. In his

deposition testimony, Thomas stated that he knew not to use other chemicals with Lewis Red Devil Lye. Thomas was never directly asked, nor did he indicate, whether he was aware that it was dangerous to mix Liquid Fire with Lewis Red Devil Lye. Plaintiff further stated that he was aware prior to the time of his injury that a person using chemicals should carefully follow the directions in order to avoid injury.

Dr. E.C. Ashby, a Regent Professor of Chemistry at the Georgia Institute of Technology, performed a series of tests on the drain blow-back residue. Dr. Ashby's analysis established that the drain residue was made principally of sodium sulphate. Sodium sulphate is formed when sodium hydroxide, found in Lewis Red Devil Lye, is mixed with sulfuric acid, found in Liquid Fire. In addition, the residue contained unmixed sodium hydroxide, found in Lewis Red Devil Lye. The expert testimony of Dr. Ashby indicates that a mixture of sulfuric acid with sodium hydroxide in a drain with water present would likely cause a blow back of the magnitude which occurred in this instance.

The warning label of Lewis Red Devil Lye was changed in 1989. Although it cannot be definitively proven which label was on the Lewis Red Devil Lye at the time the injury occurred because the cans of product were thrown out subsequent to the injury, the record indicates that the Habersham Hardware and Home Center, where the Lewis Red Devil Lye and Liquid Fire were purchased, had not purchased Lewis Red Devil Lye at any time in 1989 through February of 1990. Therefore, for purposes of this summary judgment motion, the court will assume that the Lewis Red Devil Lye in question contained the

1986 warning label. Both parties contend or admit, respectively, that the 1989 warning label provides a better overall warning, although Defendants strenuously contest any implication that the 1986 label is in any way deficient or defective.

II. DISCUSSION

Plaintiff Thomas brings a five count amended complaint. Count one asserts a product liability claim sounding in negligence against American Home Products, Inc., Boyle-Midway, and Amazing Products, Inc., for Defendants' failure to provide proper and adequate warning of their products' inherently dangerous propensities. Count two is a breach of warranty claim alleging that Defendants American Home Products Corp., Boyle-Midway, and Amazing Products breached the implied warranty of merchantability and implied warranty of fitness with respect to their products. Count three is a strict liability claim alleging that American Home Products, Inc., Boyle-Midway and Amazing Products marketed a defective product either in its manufacture, packaging or the failure to warn adequately of the product's dangerous propensities. Count four seeks punitive damages against Defendants American Home Products Corp. and Boyle-Midway because of their actual notice of similar injuries involving Lewis Red Devil Lye that occurred prior to the injury of Thomas. Plaintiff also seeks punitive damages against Defendant Amazing Products for its constructive notice that its product is inherently dangerous. Count five seeks loss of consortium on behalf of Plaintiff Hazel Thomas against Defendants because of Mr. Thomas's permanent injuries.

Defendants have moved for summary judgment as to all of Plaintiffs' claims on various grounds.[3] Currently pending before the court are three motions for summary judgment filed by the Defendants. Defendant Amazing Products argues that it has no duty to warn Plaintiff about the dangerous propensities of its product because Plaintiff never used Liquid Fire. Furthermore, Amazing Products alleges that the presence of Liquid Fire in the drain system was not the proximate cause of Plaintiff's injury. Defendants American Home Products and Boyle-Midway contend that Plaintiff's failure to warn claims, whether under a negligence theory or strict liability theory, fail because Thomas failed to read the warning label provided on the Lewis Red Devil Lye prior to use and,

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[3] Fed. R. Civ. P. 56 mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of every element essential to the party's case, and on which that party will bear the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552 (1986); *Brown v. City of Clewiston*, 848 F.2d 1534, 1536 (11th Cir. 1988). Once the movant carries his burden of asserting the basis for his motion, *see Celotex*, 477 U.S. at 323, 106 S. Ct. at 2553, the non-moving party is then required "to go beyond the pleadings" and present competent evidence designating "specific facts showing that there is a genuine issue for trial." *Id.* at 324, 106 S. Ct. at 2553. To survive a motion for summary judgment, the non-moving party must come forward with specific evidence of *every* element material to his case so as to create a genuine issue for trial. *See Celotex Corp.*, 477 U.S. at 323, 106 S. Ct. at 2552 ("there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial"); *Brown*, 848 F.2d at 1537.

therefore, cannot establish the requisite causation element. Plaintiffs' other allegations of product defect relating to the ultrahazardous danger of Lewis Red Devil Lye are essentially contested under the theory that Defendants are under no duty to provide a completely safe product, merely a product that if used properly (i.e., complying with all warnings and directions) does not provide an unreasonable danger to ultimate consumers.

All three Defendants contend that their respective products are not defective and provide adequate warnings as a matter of law. Furthermore, all three Defendants contend that Plaintiffs' breach of warranty claims are barred for lack of privity. In addition, Defendant American Home Products Corp. seeks summary judgment, alleging that it is not a proper party to this lawsuit because it never manufactured, marketed or distributed Lewis Red Devil Lye. These functions were performed solely by Boyle-Midway, Inc., and Boyle-Midway Household Products, Inc., wholly owned subsidiaries of American Home Products. Defendant American Home Products contends that there is no legal or evidentiary basis to support the piercing of Boyle-Midway's corporate form in order for liability to attach to American Home Products. Finally, Defendants American Home Products and Boyle-Midway contend that there is no evidentiary basis on which to support a claim for punitive damages.

A. Alleged Failure to Provide Adequate Warnings

The key issue in this dispute is Plaintiffs' allegations that Defendants failed to meet their obligations of

adequately warning Mr. Thomas of the dangers associated with the use of Defendants' products.

Under Georgia law, the failure to meet a duty to warn is actionable under both a negligence and a strict liability theory.[4] *Rhodes v. Interstate Battery System of America*, 722 F.2d 1517, 1518-19 (11th Cir. 1984); *White v. W.G.M. Safety Corp.*, 707 F. Supp. 544, 546 (S.D. Ga. 1988), *aff'd*, 891 F.2d 906 (11th Cir. 1989) ("[u]nder Georgia law a manufacturer may be liable under both negligence and strict liability"); *McCurley v. Whitaker Oil Co.*, 193 Ga. App. 527, 528, 338 S.E.2d 412, 414 (1989) (breach of a duty to warn provides separate theories of recovery for negligence, strict liability, and recklessness). The duty to warn may be breached in two ways: (1) by failing to provide an adequate warning of the product's potential risk and inherent dangers, or (2) by failing to provide an adequate means to communicate the warning to the ultimate user. *Rhodes*, 722 F.2d at 1519 (applying Georgia law) (citing *Stapleton v. Kawasaki Heavy Indus., Ltd.*, 608 F.2d 571, 573 (5th Cir. 1979), *modified on other grounds*, 612 F.2d 905 (5th Cir. 1980)). In this case, Plaintiff Thomas alleges that Defendants have failed to meet their duty to warn both because the warnings are deficient and because the means of communicating the warnings were inadequate.

The duty to warn requires a manufacturer to warn of any non-obvious or non-known perils or dangers which

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[4] Georgia law applies to this action because where jurisdiction is founded upon diversity of citizenship, the law of the forum state applies. *See* 28 U.S.C. § 1332; *Chapman v. American Cyanamid Co.*, 861 F.2d 1515, 1519 n.3 (11th Cir. 1988).

the manufacturer has reason to anticipate may result from the use of its product. *Foskey v. Clark Equipment Co.*, 715 F. Supp. 1088, 1090, 1091 (M.D. Ga. 1989), *aff'd without opinion*, 914 F.2d 269 (11th Cir. 1990).[5] "Whether a duty to warn exists thus depends upon foreseeability of the use in question, the type of danger involved, and the foreseeability of the user's knowledge of the danger." *McCurley*, 193 Ga. App. at 528, 388 S.E.2d at 414 (quoting *Giordano v. Ford Motor Co.*, 165 Ga. App. 644, 645 (2), 299 S.E.2d 897 (1983)). "Whether adequate efforts were made to communicate a warning to the ultimate user and whether the warning if communicated was adequate are uniformly held questions for the jury." *Stapleton*, 608 F.2d at 573, *cited in Rhodes*, 722 F.2d at 1519, and *Watson v. Uniden Corp. of America*, 775 F.2d at 1516 (11th Cir. 1985). Nonetheless, "in plain, palpable and indisputable cases, . . . [where] reasonable minds cannot differ as to the conclusions to be reached," summary judgment is appropriate. *Watson*, 775 F.2d at 1516 (citing *Hercules, Inc. v. Lewis*, 168 Ga. App. 688, 689, 309 S.E.2d 865 (1983), citing *Williams v. Kennedy*, 240 Ga. 163, 163, 240 S.E.2d 51 (1977)); *see Pruitt v. P.P.G. Industry, Inc.*, 895 F.2d 734, 736 (11th Cir. 1990) (warning adequate as a matter of law) (per curiam); *Chapman v. American Cyanamid Co.*, 861 F.2d 1515, 1520 (11th Cir. 1988) (affirming summary judgment); *Hall v. Scott USA, Ltd.*, 198 Ga. App. 197, 200-01, 400 S.E.2d 700 (1990) (affirming summary judgment); *Copeland v. Ashland Oil, Inc.*, 188 Ga. App. 537, 538-39, 373

[5] This duty also includes the duty to warn of latent defects. *Id.*

S.E.2d 629 (1988) (holding warning adequate as a matter of law).

Plaintiffs allege that Defendants' drain cleaner products failed to warn adequately of the products' likelihood to react violently or explode when mixed. Plaintiffs argue that the existing language on the warning labels is deficient because it does not describe the explosive effect that results from the mixing of the products, nor are the contents of the label presented in such a format as the user would be immediately informed of the hazardous nature of the product. Furthermore, Plaintiffs contend that Defendants should have used additional pictorials to warn of their products' propensity to explode when mixed.

1. Written Warning

To the extent Defendants have failed to provide an adequate written warning on their products, and thereby breached their duty to warn an ultimate user of foreseeable dangers, the court finds that Plaintiffs' negligence and strict liability claims fail because Plaintiff cannot establish that the failure to provide an adequate warning caused his injury under the circumstances present. The undisputed facts show that Plaintiff is functionally illiterate. Therefore, no matter how adequate the written warning is to the normal consumer, the warning would be ineffective as to Plaintiff. Furthermore, because Lewis Red Devil Lye's warning labels and Liquid Fire's labels specifically warn against using their product in conjunction with any other drain cleaners or chemicals in order to prevent dangerous reactions likely to result in a violent

eruption, the court finds Defendants' written warnings adequate as a matter of law. *See, e.g., Pruitt,* 895 F.2d at 736.

Pursuant to the Restatement (Second) of Torts, followed by Georgia, "[w]here a warning is given, the seller may reasonably assume that it will be read and heeded." Restatement (Second) of Torts, § 402A, comment J. This language has been interpreted to create a presumption that where an adequate warning exists, it would have been read and followed, thereby favoring the manufacturer, and where the product contains no warning, a presumption is created that the user would have read an adequate warning had it been present, favoring the user. *Reyes v. Wyeth Laboratories,* 498 F.2d 1264, 1280-82 (5th Cir.), *cert. denied,* 419 U.S. 1096, 95 S. Ct. 687 (1974) (applying Texas law); *Technical Chemical Co. v. Jacobs,* 480 S.W.2d 602, 606 (Tex. 1972); *see Hawkins v. Richardson-Merrell, Inc.,* 147 Ga. App. 481, 483, 249 S.E.2d 286, 288 (1976) (citing *Reyes* with favor).[6] The presumption that

[6] This presumption analysis concerning warnings as derived from the Restatement (Second) of Torts, § 402A, comment J, has been followed and applied by numerous courts. *See Thomas v. Hoffman-LaRoche, Inc.,* 949 F.2d 806, 812-14 (5th Cir. 1992) (applying Mississippi law); *Knowlton v. Deseret Medical, Inc.,* 930 F.2d 116, 123 (1st Cir. 1991) (applying Massachusetts law); *Hermes v. Pfizer, Inc.,* 848 F.2d 66, 70 n.20 (5th Cir. 1988) (applying Mississippi law); *Petty v. United States,* 679 F.2d 719, 729 n.9 (8th Cir. 1982) (applying Iowa law); *Snawder v. Cohen,* 749 F. Supp. 1473, 1479-80 (W.D. Ky. 1990) (applying Kentucky law); *Walsh v. Ford Motor Co.,* 106 F.R.D. 378, 401 (D.D.C. 1985); *Petty v. United States,* 592 F. Supp. 687, 690-92 (N.D. Iowa 1983) (applying Iowa law); *Eagle-Picher Indus., Inc. v. Balbos,* 326 Md. 179, 604 A.2d 445, 468-69 (1992); *Magro v. Ragsdale Bros., Inc.,* 721 S.W.2d 832, 834 (Tex. 1986); *Wooderson v. Ortho Pharmaceutical Corp.,* 235 Kan. 387, 681 P.2d 1038, 1057, *cert. denied,* 469 U.S. 965, 105 S. Ct. 365 (1984); *Coffman v. Keene Corp.,* 608 A.2d 416, 419-22 (N.J. Super. A.D. 1992) (citing cases); *Seley v. G.D. Searle & Co.,* 67 Ohio St. 2d 192, 423 N.E.2d 831, 838 (1981).

the user would have read an adequate warning can be rebutted, however, if the manufacturer provides evidence that the user would nonetheless have not read the warning. *Reyes,* 498 F.2d at 1281; *Jacobs,* 480 S.W.2d at 606. Evidence sufficient to rebut this presumption includes the fact that the user was "blind, illiterate, intoxicated at the time of the product's use, irresponsible, lax in judgment, or by some other circumstance tending to show that the improper use would have occurred regardless of the proposed warnings or instructions." *Magro,* 721 S.W.2d at 834; *Coffman,* 608 A.2d at 420. Therefore, even assuming for the sake of argument that Defendants' warning labels were found to be deficient or inadequate, thereby establishing a presumption that Plaintiff would have read an adequate warning, Thomas's illiteracy rebuts this presumption and precludes a finding of causation. *See Power v. Crown Controls Corp.,* 149 Misc.2d 967, 968, 568 N.Y.S.2d 674, 675 (N.Y. Sup. 1990) ("The presumption that a user would have heeded warnings can be rebutted by proof that an adequate warning would have been futile since plaintiff would not have read it.").

2. Means of Communicating Warning

Nevertheless, a finding that a particular warning was adequate as a matter of law, *or that a plaintiff did not or could not read the warning at issue does not prevent recovery*

under a failure to warn theory in all cases. See Rhodes, 722 F.2d at 1519. The plaintiff may still challenge "the adequacy of the efforts of the manufacturer or seller to communicate the dangers of the product to the buyer or user." *Id.* (citing *Stapleton*, 608 F.2d at 573). In the instant action Plaintiff Thomas contends that Defendants' means of communicating their warning was inadequate because of their failure to use additional pictorials on the label. Specifically, Plaintiffs allege that Defendants should have added a pictorial showing the explosive nature of Defendants' products.

Initially, the court finds that it is imminently foreseeable that a user of either Lewis Red Devil Lye or Liquid Fire would be illiterate. *See Zigler v. E. I. Du Punt de Nemours & Co.*, 53 N.C. App. 147, 155-56, 280 S.E.2d 510, 516 (1981), *review denied*, 304 N.C. 393, 285 S.E.2d 838 (1981); *Power*, 149 Misc.2d at 970, 568 N.Y.S.2d at 676. Additionally, the court notes that a pictorial warning against the mixing of drain cleaners would be possible simply by showing two bottles with liquid pouring out above a funnel, representing a drain, with a circle and a crossbar through it. Therefore, the court finds that Thomas has provided a reasonable basis to support a failure to warn claim based upon Defendants' failure to provide additional pictorial warnings reasonably likely to apprise him of their products' dangerous qualities sufficient. *See Rhodes*, 722 F.2d at 1520.

Notwithstanding a valid failure to warn claim, summary judgment is appropriate for the Defendants in this instance based on the facts present, because Plaintiff cannot show that any deficiency in Defendants' warnings

was the proximate cause of Plaintiff's injuries. The undisputed evidence establishes that Thomas was unaware prior to his using Lewis Red Devil Lye when he was injured that Liquid Fire (i.e., sulfuric acid) had been added to the building's drain system. Therefore, any additional pictorial warnings concerning the explosive nature of the products or prohibiting the mixing of drain cleaners would be futile because the warnings alone would not put Thomas on notice of the potential danger he faced by adding Lewis Red Devil Lye to the drain system in question. The simple facts are that Thomas did not know that the drain system was blocked, preventing the escape of any added materials or chemicals, nor was he aware that any drain cleaner other than Liquid Fire had been added to the drain system. Thus, any deficiency in the Defendants' products' warning labels did not cause Plaintiff Thomas's injuries. His injuries were caused by unknown third-party acts and unforeseeable consequences.

3. Work Place Communication Theory

Plaintiffs impliedly attempt to create a dispute of material fact as to the causation element under their failure to warn claims through the affidavit testimony of Thomas's co-workers indicating that had they been adequately warned of Defendants' products' propensity to explode when mixed, they would have in turn warned Plaintiff of this danger and the fact that they had used both cleaners in the drain system. This information would have forewarned Plaintiff not to add Lewis Red

Devil Lye to the drain system or to take additional precautions, which in turn would have prevented his injury. Plaintiffs have provided no authority in support of this theory, and, frankly, the court does not believe that this provides a reasonable basis to preclude summary judgment for the Defendants. Nonetheless, a review of the case law indicates that there is some non-binding precedent which supports a work-place communication theory to establish causation in a failure to warn situation. *See Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1538-39 (D.C. Cir.), *cert. denied*, 469 U.S. 1062, 105 S. Ct. 545 (1984); *Power*, 149 Misc.2d at 970, 568 N.Y.S.2d at 676. The basis for this theory is that in an organized society, the realities of society trump traditional common-law limitations on an actor's duty because product warnings are typically disseminated through work place communications from supervisors to workers. *Ferebee*, 736 F.2d at 1539. Therefore, any failure adequately to warn the injured user's co-workers or supervisors could establish causation, because arguably the informed co-worker would have warned the injured user. *Id.*

Initially, the court finds that Georgia product liability law would not support a worker's communication theory to establish proximate cause, but rather would follow traditional common law limitations requiring a user to accept some responsibility for his actions and read the warning labels of products prior to use. *See Center Chemical Co. v. Parzini*, 234 Ga. 868, 869-70, 218 S.E.2d 580 (1975); Restatement (Second) of Torts, § 402A, comments H & J. Furthermore, even assuming this theory would be

followed in Georgia, Plaintiffs cannot meet the requirements of the theory necessary to imply causation. The co-worker's communication theory requires "that *someone* in the work place have read the label." *Ferebee*, 736 F.2d at 1539. The co-worker's reading of the warning label replaces or fulfills the user's duty to read the label in order to establish causation. *Id.* In this instance, the undisputed facts show that neither Thomas, Tony White, nor John Lawton Wofford read the warning label on either the Lewis Red Devil Lye or Liquid Fire. Furthermore, unlike Thomas, there is no evidence indicating that either White or Wofford was illiterate or otherwise unable to read the labels prior to use. Therefore, the court finds that the work place communication theory is inapplicable to this case, and Plaintiff cannot establish that any alleged deficiency in Defendants' warnings was the proximate cause of his injuries.

B. Ultrahazardous Nature of Products

The court finds that all of Plaintiffs' other arguments and theories of recovery relate directly to their theory that sodium hydroxide and sulfuric acid are of such an ultrahazardous nature that they are unable to be made safe through adequate warnings for use by the consuming public. The ultrahazardous nature of these products has already been addressed by the Georgia courts, which found that where adequate warnings are provided, they can reasonably be used safely by the consuming public. *See Parzini*, 234 Ga. at 870-71; *Lang v. Federated Department Stores, Inc.*, 161 Ga. App. 760, 761, 287 S.E.2d 729 (1982). Therefore, these claims are precluded.

C. Breach of Warranty Claim

Defendants argue that Plaintiffs' breach of warranty claims are barred because no privity exists between Defendants and Plaintiffs. Plaintiffs admit that there is generally no implied warranty between a manufacturer and an ultimate consumer, but rather rely on an exception to the general rule which provides that no privity is required where a product is "dangerous in nature" or "imminently dangerous." *Beam v. Omark Industries, Inc.*, 143 Ga. App. 142, 146, 237 S.E.2d 607 (1977). This exception, however, is not applicable because as already discussed, Defendants' drain cleaner products are not "imminently dangerous." Lewis Red Devil Lye and Liquid Fire are only dangerous if not used properly according to the directions and warnings provided. Therefore, the court finds that the general privity requirement applies, and Plaintiffs' breach of warranty claims are barred. *See Morgan v. Mar-Bel, Inc.*, 614 F. Supp. 438, 441 (N.D. Ga. 1985); *Lamb v. Georgia-Pacific Corporation*, 194 Ga. App. 848, 850, 392 S.E.2d 307 (1990); *Stewart*, 131 Ga. App. 747, 751-52, 206 S.E.2d 857 (1974), *aff'd*, 233 Ga. 578, 212 S.E.2d 337 (1975).

III. CONCLUSION

Having found that Plaintiffs cannot establish that any deficiency in the warning labels of Defendants' products was the proximate cause of Plaintiff's injury and that no privity exists between Plaintiffs and Defendants, the court finds no basis to support Plaintiffs' claims as a matter of law. Therefore, Defendant Amazing Products'

motion for summary judgment [62-1], Defendants American Home Products Corp. and Boyle-Midway, Inc.'s motion for summary judgment [63-1], and Defendant American Home Products' motion for summary judgment [64-1] are GRANTED.

SO ORDERED, this 29th day of September, 1993.

/s/ J. Owen Forrester
J. OWEN FORRESTER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

D. L. THOMAS and HAZEL THOMAS, Plaintiffs,	:	CIVIL ACTION NO. 1:91-CV-0100-JOF
vs.	:	
AMERICAN HOME PRODUCTS CORPORATION, et al., Defendants.	:	

AMENDED ORDER

(Filed Oct. 8, 1993)

The court hereby AMENDS its order in the above-captioned case, filed September 30, 1993, to reflect the following.

The sentence on page four, footnote one, line seven, should read: For summary judgment purposes the court will assume that Thomas was unaware of the Liquid Fire being added to the drain system because of Plaintiff's uncontradicted, direct testimony that he was unaware that Liquid Fire had been added to the drain system.

The sentence on page sixteen, paragraph one, line six, should read: The simple facts are that Thomas did not know that the drain system was blocked, preventing the escape of any added materials or chemicals, nor was he aware that any drain cleaner other than Lewis Red Devil Lye had been added to the drain system.

In all other respects the order of September 30, 1993, shall remain the same.

SO ORDERED, this 8th day of October, 1993.

/s/ J. Owen Forrester
J. OWEN FORRESTER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-9214

D. L. THOMAS;
HAZEL THOMAS,

Plaintiffs-Appellants,

versus

AMERICAN HOME PRODUCTS, INC.;
BOYLE-MIDWAY, INC.;
AMAZING PRODUCTS, INC.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Filed June 5, 1995)

Before: EDMONDSON and BIRCH, Circuit Judges, and
HILL, Senior Circuit Judge

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. L. Edmondson
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-9214

D. L. THOMAS;
HAZEL THOMAS,

Plaintiffs-Appellants,

versus

AMERICAN HOME PRODUCTS, INC.;
BOYLE-MIDWAY, INC.;
AMAZING PRODUCTS, INC.,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Georgia

(Filed June 15, 1995)

Before EDMONDSON and BIRCH, Circuit Judges, and HILL, Senior Circuit Judge.

ORDER:

This court's ORDER of 5 June 1995, denying the petition for rehearing is recalled.

The parties are directed to file briefs (not to exceed twelve pages in length), commenting on the effect of *Banks, et al. v. ICI Americas, Inc.*, 450 S.E.2d 671 (Ga. 1994), on this case. Appellants' brief shall be filed no later than

20 June 1995. Appellees' brief shall be filed no later than 22 June 1995. No extensions of time should be expected.

/s/ J.L. Edmondson
UNITED STATES
CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-9214

D. L. THOMAS;
HAZEL THOMAS,

Plaintiffs-Appellants,

versus

AMERICAN HOME PRODUCTS, INC.;
BOYLE-MIDWAY, INC.;
AMAZING PRODUCTS, INC.,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Georgia

(Filed Feb. 9, 1996)

Before EDMONDSON and BIRCH, Circuit Judges, and HILL, Senior Circuit Judge.

ORDER:

In part because we conclude, for the reasons expressed in *I.C.I Americas v. Banks*, 460 S.E.2d 797, 798 n.1 (Ga. App. 1995), that the holding of the Georgia Supreme Court in *Banks v. I.C.I*, 450 S.E.2d 671 (Ga. 1994), would not apply to the injuries involved in this case, we deny the Appellants' Suggestion of Rehearing (or Hearing) En Banc and Appellants' Petition for Rehearing. *See*

also, General Motors Corp. v. Rasmussen, 340 S.E.2d 589 (Ga. 1986) (Georgia law recognizes partial prospectivity).

CONSTITUTION OF THE UNITED STATES

[AMENDMENT V]

[Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE UNITED STATES

[AMENDMENT XIV]

Section 1.

[Citizenship Rights Not to Be Abridged by States]

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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(2)

No. 95-1826

In The

Supreme Court of the United States

October Term, 1995

D. L. THOMAS and HAZEL THOMAS,

Petitioners,

v.

AMERICAN HOME PRODUCTS, INC., BOYLE-MIDWAY, INC., and AMAZING PRODUCTS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States District Court for the Northern District of Georgia created a class of illiterate product users?

2. Whether the Eleventh Circuit erred in exercising its discretion by not certifying to the Georgia Supreme Court the question of whether *Banks v. ICI Americas, Inc.* is retroactive?

3. Did any alleged failure of the Eleventh Circuit to certify the question of whether *Banks v. ICI Americas, Inc.* is retroactive have any effect on this case since *Banks v. ICI Americas, Inc.* does not affect the outcome of this case?

4. Whether the Eleventh Circuit departed from binding precedent as alleged by the Petitioners?

PARTES TO THE PROCEEDING

All of the parties to the proceeding are listed in the caption of the case. There are no parent or subsidiary companies to be listed.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request this Court deny the Petition for Writ of Certiorari which seeks to reverse the judgment of the Court of Appeals for the Eleventh Circuit.

OPINIONS AND JUDGMENT BELOW

In Appendix 1a-21a to the Petition for Writ of Certiorari, Petitioners have provided the Order of the United States District Court for the Northern District of Georgia entered on 9-30-93. Appendix 22a-23a contains the Amended Order of the United States District Court for the Northern District of Georgia entered on 10-8-93. Petitioners filed an invalid Petition for Rehearing to the Eleventh Circuit, because the Court had not overlooked, misapprehended or failed to distinguish any controlling point of law or fact. Attached as Appendix 24a-25a is the denial of the Petition for Rehearing. (58 F.3d 642). While the invalid Petition for Rehearing was pending, the Georgia Supreme Court issued its opinion in *Banks v. ICI Americas, Inc.*, 264 Ga. 732, 450 S.E.2d 671 (1994).

On June 15, 1995 the denial of the Petition for Rehearing was recalled and the parties were directed to file briefs commenting on whether *Banks* had any effect on this case. On February 9, 1996, after receiving briefs by all parties on the issue, the United States Court of Appeals for the Eleventh Circuit denied the Petition for Rehearing.

JURISDICTION

Jurisdiction is not invoked under 28 U.S.C. §2101(c) as alleged by the Petition. Jurisdiction is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

O.C.G.A. §15-2-9 set forth in Appendix A;

Rules of the Supreme Court of the State of Georgia, Rule 46 set forth in Appendix B;

Federal Rule of Appellate Procedure 40 set forth in Appendix C

COUNTERSTATEMENT OF FACTS

On the morning of February 8, 1990 Petitioner, D.L. Thomas, poured a chemical drain opener known as Lewis Red Devil Lye (hereinafter "LRDL") directly from the can into a floor drain. (5/2/91 Depo. D.L. Thomas, p. 90). This drain was located in a commercial building owned by Fieldale Farms Corporation (hereinafter "Fieldale") in Clarksville, Georgia. At the time of his accident, Petitioner was an employee of Fieldale. (5/2/91 Depo. of D.L. Thomas, p. 11). Petitioner alleges that as he poured LRDL into a floor drain the contents of the drain blew back into his face.

Mr. Thomas did not know that on the day before this accident his co-workers, Tony White and J. Lawton

Wofford, had been using Liquid Fire and LRDL in an attempt to unclog the floor drain, shower drain and standpipe drain in the floor of the Fieldale building in Clarkesville, Georgia. (5/21/91 Depo. of D.L. Thomas, pp. 60-78; Pet. Appendix 5a). These drains were approximately three to four feet apart from one another and were connected together, draining into one central pipe under the concrete slab floor, which then exited the building. Thus, the contents of anything poured into one drain would mix in the drain pipe with anything poured into another drain.

Years prior to the accident, this central floor drain pipe had been cut in half outside of the building when a ditch had been dug. The ditch was then back-filled, permanently plugging the drain pipe with dirt. (Depo. Robert McClain, pp. 21, 28, 43; Pet. Appendix 4a). Petitioner and the other workers were unaware that the drains had been permanently plugged at the time they attempted to unclog them. (5-2-91 Depo. D.L. Thomas, p. 51; Depo. John Wofford, p. 34; Depo. Tony White, p. 37; Pet. Appendix 4a). Petitioner has testified that he never would have attempted to use any drain cleaner had he known the pipe had been cut. (5-2-91 Depo. D.L. Thomas, p. 52).

On the day prior to the accident when Mr. Thomas' two co-workers were attempting to unclog the floor drain, a shower drain and a standpipe drain, they used two different types of drain chemicals. (Pet. Appendix 4a, 5a). These drain cleaners had been purchased by Fieldale employee J. Lawton Wofford at a local hardware store that afternoon. Mr. Wofford purchased *two twelve ounce cans* of LRDL and *one gallon* of a drain chemical called

Liquid Fire. (Depo. J. Lawton Wofford, p. 9; Pet. Appendix 4a). LRDL consists of one hundred (100%) percent sodium hydroxide or lye. Liquid Fire consists of approximately 96% concentrated sulfuric acid. (Pet. Appendix 4a). It is well established and undisputed that combining sodium hydroxide with sulfuric acid in a drain is an extremely explosive mixture which can cause the contents of a drain to "blow back", as occurred in this case. (Pet. Appendix 4a).

As of the evening prior to the accident, significant amounts of both LRDL and Liquid Fire had been added to this drain system. At least *one full can* of LRDL and *one full gallon* of Liquid Fire had been added to the three drains. (Depo. Tony White, pp. 30-31; Pet. Appendix 4a). These empty containers were then thrown in the trash by co-worker Tony White.

In addition, Petitioner testified that at the time of the accident he poured the remainder of a can of Red Devil Lye into a floor drain. (Pet. Appendix 5a). Thus, the other portion of the second can of Red Devil Lye was added to the floor drains at some time immediately prior to Petitioner's accident.

Petitioner acknowledges that he poured the contents of the lye directly into the floor drain without measuring the amount that went in the drain and without watching to see how much lye entered the drain. After the drain blew back, Petitioner attempted to flush his eyes with water for approximately one minute in a sink faucet. (5-2-91 Depo. of D.L. Thomas, p. 114). There were no eyewitnesses to Petitioner's accident. The Petitioner was

found by co-worker Tony White some time later standing outside the building with a pair of coveralls on his face.

After the accident an analysis was performed on residue from the drain blow back by Dr. Gene Ashby, Professor of Chemistry at Georgia Tech. Dr. Ashby performed a series of tests on residue he scraped from a porcelain light fixture directly above the drain where Petitioner was kneeling at the time of his accident. Dr. Ashby's analysis of the drain residue has established that the residue contained large portions of sodium sulphate.[1] (Pet. Appendix 7a). Sodium sulphate is formed when sodium hydroxide (LRDL) mixes with sulfuric acid (Liquid Fire), a volatile combination. (Pet. Appendix 7a).

It is undisputed that at no point on the day prior to Petitioner's injury, or on the morning of Petitioner's injury, did either the Petitioner or his co-workers read the label warnings or directions on either of the cans of LRDL or on the one gallon container of Liquid Fire. (5-2-91 Depo. D.L. Thomas, p. 86; Depo. Tony White, p. 26; Depo. J. Lawton Wofford, pp. 18, 49; Pet. Appendix 5a, 6a).

Petitioner's wife had reportably read him a portion of a label on a LRDL can on one occasion sometime between three and five years prior to the accident. (5-2-91 Depo. D.L. Thomas, p. 59, Depo. Hazel Thomas, p. 11; Pet. Appendix 6a). The only thing Petitioner recalled being told by his wife was to use three tablespoons of the

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[1] Contrary to Petitioners' assertions, Charles Blake did not depose that this accident was not caused by the mixing of sodium hydroxide and sulfuric acid. (Depo. Charles Blake, pp. 128, 129, 138).

product, to keep his face away from the drain, and not to use the product with hot water. (5-2-91 Depo. D.L. Thomas, p. 145; Pet. Appendix 6a).

Petitioner admitted that he knew that it was dangerous to mix drain cleaners. (5-2-91 Depo. D.L. Thomas, p. 21). Mr. Thomas knew not to use any other chemicals, including sulfuric acid with LRDL. (5-2-91 Depo. D.L. Thomas, pp. 42, 87-88). Mr. Thomas already knew that combining lye with sulfuric acid was a "dangerous mixture." (5-2-91 Depo. D.L. Thomas, pp. 87-88). Mr. Thomas knew that when using chemicals such as drain openers, one has to follow the directions and use the chemicals carefully or risk injury. (5-2-91 Depo. D.L. Thomas, pp. 22, 119).

At the time of Petitioner's accident, he had attended school up to the third grade and could only read "just the least bit." (5-2-91 Depo. D.L. Thomas, pp. 8-10). He could not read a newspaper, magazine or a letter. He could not write any words other than his name. His supervisors and co-workers knew he could not read. (5-2-91 Depo. D.L. Thomas, pp. 48, 82).

The actions taken by the Petitioner and his co-workers in using LRDL were directly contrary to the following warnings and directions on the label:[2]

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[2] In 1989 the label/warning on LRDL was changed. However, for purposes of the motion for summary judgment, the district court assumed that the older 1986 version of the label was affixed to the product.

(1). Although the 1986 label instructed users to **"READ PRECAUTIONS ON BACK PANEL CAREFULLY", "IMPORTANT: READ ENTIRE LABEL BEFORE OPENING OR USE",** USE LEWIS RED DEVIL LYE ONLY as directed on this label . . . Any other use may result in serious personal injury . . . " Petitioner and his co-workers failed to read the label or ask anyone else to read the label to them prior to using the product.

(2). *Two different types of drain cleaners, an acid and a base, were used* prior to Petitioner's injury in attempting to unclog the drains. The 1986 label warns: "To avoid dangerous backup or spattering, **NEVER** use LYE with any chemicals or drain cleaners before, during, or after using LYE since LYE may react with such products violently."

(3). At the time of Petitioner's injury, Petitioner had to have had his face and head above the drain he had been attempting to unclog as he alleges that the blow back struck his face. The 1986 warning label on LRDL read in part: "keep **face** and **hands** away from drain, container or solution while lye is in use." **"KEEP LYE AND SOLUTIONS OF LYE AWAY FROM EYES, SKIN, MOUTH AND CLOTHING; MAY CAUSE BLINDNESS."**

(4). The Petitioner never measured how much lye he used on the morning of his accident and put lye in the drain without watching it go into the drain. Petitioner's co-workers also used the product. The 1986 label states "add three (3) tablespoons of LYE into drain. . . . "

This instruction obviously enables the user to determine exactly how much of the product is being put into the drain.

(5). *The entire contents of two (2) twelve ounce cans of LRDL* were apparently used prior to Petitioner's injury in attempting to unclog the floor drain. These chemicals were added *in a number of applications.*

As set forth above, the LRDL label instructs users to use three (3) tablespoons of lye. It further warns, "if drain is still closed after 30 minutes, repeat application ONE time ONLY."

Moreover, one full gallon of Liquid Fire was used on the drain prior to Petitioner's injury. The Liquid Fire label instructs the user to use a maximum of no more than four (4) ounces. The Liquid Fire label also expressly warns: "to avoid violent eruption, never use before, with or after other drain openers."

(6). Following Petitioner's injury, *Petitioner testified that he attempted to flush his eyes with water for approximately one (1) minute.* The 1986 warning label on LRDL instructed that if lye gets into the eyes, they must: "immediately hold face under running water for twenty (20) minutes with eye open – by force if necessary. Then cover with clean dressing or sheet. Call physician immediately."

The undisputed facts of this case demonstrate that this accident was caused by the unknown third-party acts of Mr. Thomas' co-workers and unforeseeable consequences. (Pet. Appendix 17a).

COUNTERSTATEMENT OF PROCEDURAL HISTORY

Petitioners filed suit in Fulton Superior Court for the State of Georgia, and the case was properly removed to the United States District Court for the Northern District of Georgia under diversity of citizenship.

The Respondents moved for and were granted summary judgment. The trial court found that the proximate cause of Petitioner's injuries was unforseeable acts of third parties and not any alleged negligence by the Respondents. Judge Forrester's holding that the drain at issue was clogged is not erroneous as this fact was indisputably established by the testimony in the case. Moreover, the district court properly found, based on the undisputed testimony, that the cause of the explosion was the mixture of the drain cleaners used by Mr. Thomas and his co-workers.

The testimony of Charles Blake does not, as alleged by Petitioners, create an issue of fact as to the cause of this explosion. Mr. Blake said that he was not sure of the cause while Dr. Gene Ashby's testimony conclusively establishes that it was caused by the mixture of the drain cleaners.

Further, contrary to Petitioners' contentions, the district court did not create a class of illiterate users for which it is permissible to discriminate. In addition, Petitioners did not properly raise an equal protection claim in the trial court or the Eleventh Circuit.

REASONS WHY THE PETITION SHOULD BE DENIED

I. PETITIONER HAS NOT BEEN DENIED EQUAL PROTECTION OF THE LAWS.

The Petitioners' allegations that by granting summary judgment the trial court Judge, the Honorable Owen Forrester, created a class against whom it is permissible to discriminate because of their disability is not grounded in the law or the facts of this case.[3] Petitioners' entire argument is premised on the following faulty statement: By granting summary judgment "the trial court effectively held that an illiterate user is not entitled to simple pictorial warnings of the dangers of the products he is using." (Petitioners' Petition for Certiorari, p. 11). Contrary to the Petitioners' contentions, the trial court did not create a separate class of illiterate users of products, but rather, held that users of a product, whether literate or not, are entitled to pictorial warnings.

> [T]he court finds that Thomas provided a reasonable basis to support a failure to warn claim based upon Defendants' failure to provide additional pictorial warnings reasonably likely to apprise him of their products' dangerous qualities sufficient. *See Rhodes*, 722 F.2d at 1520.

(Pet. Appendix, 16a). Thus, in direct opposition to Petitioners' contention, Judge Forrester did not create any

[3] It is noteworthy that Petitioners failed to raise any equal protection argument in the courts below. Therefore, because no extraordinary circumstances are involved, this Court should not even consider Petitioners' equal protection argument. (*see generally Yee v. City of Escondido, California*, 503 U.S. 519, 112 S.Ct. 1522 (1992)).

class of illiterate users for which Georgia products liability law permits discrimination.

The Respondents' motions for summary judgment were granted because Judge Forrester correctly held that the proximate cause of Mr. Thomas' injuries was not and could not have been from inadequate warnings.

> The simple facts are that Thomas did not know that the drain system was blocked, preventing the escape of any added materials or chemicals, nor was he aware that any drain cleaner other than Lewis Red Devil Lye had been added to the drain system. Thus, any deficiency in the Defendant's products' warning labels did not cause Plaintiff Thomas's injuries. His injuries were caused by unknown third-party acts and unforeseeable consequences.

(Pet. Appendix, 22a).

Therefore, the trial court's clear and unambiguous ruling is that, irrespective of the mode of communication, no conceivable warning that the manufacturers of these products could have given would have prevented this accident. Rather the accident was proximately caused by Mr. Thomas' unknowing use of the product when another drain cleaner was already present in the drain and "the simple fact that Thomas did not know that the drain system was blocked, preventing the escape of any added materials or chemicals."[4] (Pet. App. 22a). Moreover, Mr.

[4] Despite Petitioners' contentions that the drain was not clogged at the time of the accident, they admit that even after Mr. Thomas' co-workers used a gallon of Liquid Fire and at least one full bottle of LRDL, water remained in the drain.

Thomas knew it was dangerous to mix cleaners. (5-21-91 Depo. D.L. Thomas, p. 21). Thus, a warning regarding what he already knew would have been fruitless.

Since the proximate cause of Mr. Thomas' injuries was in no way connected to the adequacy of the warnings, the trial court did not create a class of users of a product for which discrimination is permitted, and the Petitioners have not been denied equal protection of the laws.

II. THE ELEVENTH CIRCUIT DID NOT ERR IN REFUSING TO CERTIFY TO THE GEORGIA SUPREME COURT THE QUESTION OF WHETHER *BANKS V. ICI AMERICAS, INC.* IS RETROACTIVE AND *BANKS* HAS NO APPLICATION TO THIS CASE.

Contrary to Petitioners' contention, the Eleventh Circuit Court of Appeals did not err in failing to certify to the Georgia Supreme Court the question of whether *Banks v. ICI Americas*, 264 Ga. 732 (450 S.E.2d 671) (1994) is retroactive. Notably absent from the Petitioners' argument is any citation supporting the position that this issue should have been certified to the Georgia Supreme Court. The law clearly and unequivocally establishes that it is solely within the court's discretion to determine whether to certify a question.

> (a) The Supreme Court of this state, by rule of court, may provide that when it shall appear to the Supreme Court of the United States, to any circuit court of appeals of the United States, or to the Court of Appeals of the District of Columbia that there are involved in any proceeding before it questions or propositions of the laws of this state which are determinative of the case and there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify the questions or propositions of the laws of this state to the Supreme Court of this state for instructions concerning the questions of propositions of state law, which certificate the Supreme Court of this state may answer by written opinion.

O.C.G.A. §15-2-9, Appendix A; Rules of the Supreme Court of the State of Georgia, Rule 46, Appendix B.

More importantly, whether *Banks v. ICI Americas* applies retroactively does not alter the outcome of this case and as such, the issue of whether the retroactivity question should have been certified to the Georgia Supreme Court is irrelevant and not grounds for granting this Petition for Writ of Certiorari.[5] The Eleventh Circuit expressly recognized that other grounds, separate and apart from the issue of *Banks'* retroactivity, existed for upholding the District Court's grant of summary judgment and for the denial of the Petition for Rehearing:

> In part because we conclude, for the reasons expressed in *I.C.I. Americas v. Banks*, 460 S.E.2d 797, 798 n.1 (Ga. App. 1995), that the holding of the Georgia Supreme Court in *Banks v. I.C.I.*, 450 S.E.2d 671 (Ga. 1994), would not apply to the injuries involved in this case, we deny the Appellants' Suggestion of Rehearing (or Hearing) En Banc and Appellants' Petition for

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[5] On April 29, 1996 the Georgia Supreme Court held that *Banks v. ICI Americas*, 264 Ga. 732 (1994) applies retroactively.

> Rehearing. See also, *General Motors Corp. v. Rasmussen*, 340 S.E.2d 589 (Ga. 1986) (Georgia law recognized partial prospectivity).

(Petition, App. 28a).

There are several reasons why the *Banks* decision does not affect the outcome of this case and why the decisions of both Judge Forrester and the Eleventh Circuit are correct. First, Petitioners had no legal basis for filing a Petition for Rehearing in the Eleventh Circuit Court of Appeals. Federal Rule of Appellate Procedure for the Eleventh Circuit, Rule 40 (Appendix C), governs the filing of petitions for rehearing and sets forth a very particular standard that must be met for a proper and legally reviewable petition to be filed:

> The petition must state with particularity the points of law or fact which in the opinion of the petitioner the Court has overlooked or misapprehended and must contain such argument in support of the petition as the petitioner desires to be present.

While the Petitioners admittedly recognized that *Center Chemical v. Parzini*, 234 Ga. 868 (218 S.E.2d 580) (1975) and its progeny remained valid law when the Petition for Rehearing was filed, they nevertheless asked the Eleventh Circuit to certify to the Georgia Supreme Court the question of whether the Georgia court would depart from this long-standing precedent. This is obviously not the purpose of a Petition for Rehearing. The Petitioners improperly used the appeal process to delay the dismissal of their case in hopes that a favorable ruling would be handed down in the interim.

This filing of an appeal, in hopes of having a fortuitous decision entered while the case was pending on appeal, is not the purpose of, nor permissible under, the Federal Rules of Appellate Procedure. Thus, since no grounds existed for the filing of the Petition for Rehearing and because the trial court's decision was based on valid and applicable Georgia law at the time of its decision, the denial of the Petition for Rehearing was warranted. There was simply no basis for asking or requiring the Eleventh Circuit to inquire of the Georgia Supreme Court where clearly established and long-standing Georgia law remained valid after 20 years. As such, the improper filing of the Petition for Rehearing constitutes a separate and distinct reason for the denial of the Petition for Rehearing by the Eleventh Circuit.

Because this case was not properly pending before the Eleventh Circuit, it could not exercise its discretion to certify any question to the Georgia Supreme Court. The Petition for Rehearing was invalid, and therefore the Eleventh Circuit properly denied it. Thus, the subsequent *Banks* decisions have no effect on this case.

Lastly, there is no compelling reason for this Court to grant these Petitioners' Writ of Certiorari. There are no compelling or significant constitutional issues, no issue involving preemption, no questions relating to federal statutes, and no issues with broad applicability to the welfare of the general public which will impact other litigants. Irrespective of whether the product was defective, even under a retroactive application of *Banks*, and regardless of whether the warnings were legally adequate, the Petitioners' claims cannot be sustained.

As the trial court correctly held, the Petitioners must prove every element of their claim to survive a motion for summary judgment. The Petitioners could not prove every element of their claim, because the proximate cause of Mr. Thomas' injuries was "unknown third-party acts and unforeseeable consequences." (Pet. Appendix 17a).

Petitioners try to circumvent this point in their Petition for Rehearing by arguing that Judge Forrester erred in even considering the proximate cause issue, inasmuch as the threshold question of the adequacy of the warning was clearly for the jury. This is patently incorrect. There is no threshold question which must be submitted to the jury before other elements of the Petitioners' claim can be considered. The court can evaluate all of the elements and if one fails, the claim fails. After all, this is the very purpose of summary judgment. (*See Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986)).

As there are ample bases to support the district court's grant of summary judgment and the Eleventh Circuit's affirmation of that ruling,[6] this Petition for Writ of Certiorari should be denied.

Lastly, even if the holding in *Banks* was applied to this case, the trial court's grant of summary judgment was still proper. The *Banks* decision does not change the well-established principle of law in Georgia that a manufacturer does not occupy the status of insurer and is

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[6] The Eleventh Circuit may affirm the District Court's decision without a written opinion, as it did in this case, when the lower court's decision is supported by the record. (11th Cir. R. 36-1) (Appendix D).

under no duty to make a product that is accident proof or foolproof. *Hunt v. Harley-Davidson Motor Company, Inc.*, 147 Ga. App. 44 (248 S.E.2d 15) (1978). "We affirm that under Georgia law a manufacturer is not an insurer that its product is, from a design viewpoint, incapable of producing injury." *Banks* at 677. Under this very well-reasoned principle of law, an automobile is not defective merely because a drunk driver kills someone while driving it. Similarly, the product at issue in this case, Lewis Red Devil Lye drain cleaner, is not defective because when misused, and used in direct contradiction to its warnings, it causes injury.

In the Order granting the Respondents' Motions for Summary Judgment, Judge Forrester found that the accident in question occurred when two different drain cleaners were mixed together in excess proportions. (Pet. Appendix 4a, 5a) Thus, the Lewis Red Devil Lye was severely misused when it was combined in excess amounts with another drain cleaner, in direct contradiction to the warnings. Moreover, Appellant, D.L. Thomas, admitted that he was aware of the fundamental principle that different types of chemicals, including drain cleaners, should not be mixed. (5-21-91 Depo. D.L. Thomas, pp. 42, 87-88). The trial court considered these factors, which are also factors in a risk-utility analysis pursuant to *Banks*, and found that the products were not defective as a matter of law due to the misuse of the product. (Pet. Appendix 6a, 7a, 22a, 23a).

Petitioners will probably argue that because their expert, Dr. Abraham, testified that in his opinion there existed alternative safer designs, they are entitled to a trial. Georgia courts have long recognized, and the

Supreme Court in *Banks* reiterated, that virtually every product is capable of producing injury, and just because someone testifies that he thinks that an alternative design exists now, as opposed to the time of the incident, does not mean that the product is defective. Nor does it mean that Petitioners are entitled to a trial in light of evidence that the product was misused and used adversely to the warnings.

Therefore, even applying a risk-utility approach, as urged by the Petitioners, and contested by the Respondents, it cannot be said that the Lewis Red Devil Lye was defectively designed.

In conclusion, in denying the Petition for Rehearing the Eleventh Circuit recognized that several bases existed for denying the Petition for Rehearing and for upholding the trial court's decision. The Petition for Writ of Certiorari presents no grounds for overturning those decisions and lacks any justiciable issue that needs to be decided by this Court. As such, the Petition for Writ of Certiorari should be denied.

III. THE ELEVENTH CIRCUIT FOLLOWED BINDING PRECEDENT.

The adequacy of the warning in this case is irrelevant to the outcome; thus, Petitioners' argument that it is necessarily a jury question is erroneous. As previously discussed in Parts I and II of this Reply Brief in Opposition to Petition for Writ of Certiorari, the trial court found, and the Eleventh Circuit correctly upheld, that the incident in question was a result of the unforseeable and intervening acts of third parties which would not have

been prevented by even the most perfectly conveyed warning. Therefore, Petitioners' argument that whether the warning at issue was adequate should be a question for the jury is baseless and presents no grounds for a Petition for Writ of Certiorari to this Court.

Moreover, Petitioners' argument that the Eleventh Circuit departed from the binding precedents of this Circuit is fallacious. The cases relied upon by the Petitioners, *Watson v. Uniden Corporation of America*, 775 F.2d 1514 (11th Cir. 1985), *Rhodes v. Interstate Battery System of America*, 722 F.2d 1517 (11th Cir. 1984), and *Stapleton v. Kawasaki*, 608 F.2d 571 (5th Cir. 1979), *modified on other grounds*, 612 F.2d 905 (5th Cir. 1980), are inapposite to the instant one. All of those cases involved facts where the injuries complained of were, as a matter of law, proximately caused by the alleged dangerous propensity of the products at issue. Therefore, the Eleventh Circuit did not fail to follow binding precedent, but instead, correctly refused to apply distinguishable and inapplicable case law to the present case.[7]

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[7] Moreover, while generally the adequacy of a warning is a question for the jury, the well established principle of law in Georgia is that "in plain, palpable and indisputable cases . . . [where] reasonable minds cannot differ as to the conclusions to be reached," summary judgment is appropriate. (*Watson v. Uniden Corp. of America*, 775 F.2d 1514 (11th Cir. 1985)) (citing *Hercules, Inc. v. Lewis*, 168 Ga. App. 688, 309 S.E.2d 865 (1983). The case sub judice is a plain, palpable and undisputed case where reasonable minds cannot differ as to the adequacy of the written warning given. That is, Respondents' label specifically warned against the very incident and harm complained of: That the product should not be used in conjunction with other drain cleaners or chemicals because a dangerous and violent reaction could result from such misuse.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

CODE OF GEORGIA

TITLE 15. COURTS

CHAPTER 2. SUPREME COURT

ARTICLE 1. GENERAL PROVISIONS

Current through the End of 1995 Extraordinary Session of the General Assembly

15-2-9 Answers to questions certified by federal appellate courts.

(a) The Supreme Court of this state, by rule of court, may provide that when it shall appear to the Supreme Court of the United States, to any circuit court of appeals of the United States, or to the Court of Appeals of the District of Columbia that there are involved in any proceeding before it questions or propositions of the laws of this state which are determinative of the case and there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify the questions or propositions of the laws of this state to the Supreme Court of this state for instructions concerning the questions or propositions of state law, which certificate the Supreme Court of this state may answer by written opinion.

(b) The Court of Appeals shall not have jurisdiction to consider any question certified under this Code section by transfer or otherwise.

(Code 1933, Sec. 24-3902, enacted by Ga. L. 1977, p. 577, Sec. 1.)

APPENDIX B

RULE 46. FEDERAL COURTS

When it shall appear to the Supreme Court of the United States, to any Circuit Court of Appeals of the United States, or to the Court of Appeals of the District of Columbia that there are involved in any proceeding before it questions or propositions of the laws of this State which are determinative of said cause and there are no clear controlling precedents in the appellate court decisions of this State, such federal appellate court may certify such questions or propositions of the laws of Georgia to this Court for instructions.

[Adopted effective May 22, 1995.]

APPENDIX C

FRAP 40. PETITION FOR REHEARING

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. However, in all civil cases in which the United States or an agency or officer thereof is a party, the time within which any party may seek rehearing shall be 45 days after entry of judgment unless the time is shortened or enlarged by order. The petition must state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and must contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(b) Form of Petition; Length. The petition shall be in a form prescribed by Rule 32(a), and copies shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs. Except by permission of the court, or as specified by local rule of the court of appeals, a petition for rehearing shall not exceed 15 pages.

[Amended April 30, 1979, effective August 1, 1979; April 29, 1994, effective December 1, 1994.]

APPENDIX D

11th CIR. R. 36-1. AFFIRMANCE WITHOUT OPINION

When the court determines that any of the following circumstances exist:

(a) the judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) a summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) the judgment has been entered without a reversible error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

[Amended effective April 1, 1994.]

No. 95-1826

In The

Supreme Court of the United States

October Term, 1995

D.L. THOMAS and HAZEL THOMAS,

Petitioners,

v.

AMERICAN HOME PRODUCTS, INC.,
BOYLE-MIDWAY, INC. and
AMAZING PRODUCTS, INC.,

Respondents.

**On Petition For A Writ Of Certiorari
To The Court Of Appeals
For The Eleventh Circuit**

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF THE ARGUMENT

Petitioners, D.L. Thomas and Hazel Thomas, filed a petition for writ of certiorari in this court on May 9, 1996. Therein petitioners presented three questions, and now file this supplemental brief to call attention to a new case not available at the time of petitioners' original filing of its writ for certiorari.

Petitioners' second reason for granting the petition for certiorari was based upon the 11th Circuit's erroneous conclusion "in part" that the Georgia Supreme Court's ruling in *Banks v. ICI Americas, Inc.*, 264 Ga. 732, would not apply to the injuries involved in the present case, based on the reasons expressed in *ICI Americas v. Banks*, 218 Ga. App. 237, footnote 1, regarding retroactivity.

Petitioners had argued in the 11th Circuit that the holding in *Banks v. ICI* had been held retroactive, at least as to *Banks v. ICI* itself, and that therefore *Banks v. ICI* applied to the present case. The 11th Circuit concluded otherwise and denied appellants' suggestion of rehearing (or hearing) en banc and appellants' petition for rehearing. (See appendix to writ, 28a).

On April 29, 1996, not published in the opinion section of the Fulton County Daily Report until Tuesday, May 7, 1996 (received in this office Wednesday, May 8, 1996, the day petitioners' writ was mailed to this court) the Georgia Supreme Court once again considered the case of *Banks v. ICI Americas, Inc.*, ___ Ga. ___ (case no.: S95G1887) (4/29/96) (*Banks* III) and specifically held that *Banks v. ICI Americas, Inc.*, 264 Ga. 732, (*Banks* I) *should* be applied retroactively, contrary to the 11th Circuit.

The Georgia Supreme Court now having held the *Banks* I risk-utility analysis applies retroactively, and the only *stated* reason for the denial of appellants' suggestion of rehearing (or hearing) en banc and appellants' petition for rehearing by the 11th Circuit being that *Banks* I would *not* apply retroactively to the injuries involved in this case (appendix to petition for writ, 28a) petitioners ask that this case be reversed or remanded to the 11th Circuit, it now being clear under *Banks* III, that the 11th Circuit erroneously concluded that *Banks* I would not apply to the injuries involved in this case.

ERRATA IN PETITION FOR WRIT OF CERTIORARI

Petitioners show that in the table of authorities at page iv, *ICI Americas v. Banks* should be referenced at 218 Ga. *App.* 237 and the same notation should be made at page 12 of the petition. *ICI Americas v. Banks* at 218 Ga. App. 237 is the Georgia Court of Appeals' ruling, and is hereinafter referred to as *Banks* II.

ARGUMENT AND CITATION OF AUTHORITY

Petitioners file this supplemental brief to bring to the attention of this court the new case of *Banks v. ICI Americas, Inc.*, ___ Ga. ___ (case no.: S95G1887) (4/29/96), which came to the attention of your petitioners' counsel on the day the petition for writ of certiorari was mailed to this court.

Petitioners presented three questions to this court, and the latest decision in the line of *Banks v. ICI Americas, Inc.* cases (referred to hereinafter as *Banks* I, II or III) has now settled the question of whether or not the risk-utility analysis set forth in *Banks* I is to be applied retroactively. As petitioners contended to the 11th Circuit, *Banks* I should have been applied retroactively, and therefore applied to this case. *ICI Americas v. Banks*, 218 Ga. App. 237 (hereinafter referred to as *Banks* II) recognized implicitly that the Georgia Supreme Court had at least applied *Banks* I retroactively as to the *Banks* case itself. However, the 11th Circuit concluded that despite *Banks* I being returned to the Georgia Court of Appeals, to grant plaintiffs a new trial upon that court's determination that the remaining enumerations of error did not preclude a new trial, that nevertheless *Banks* I would not apply to the injuries involved in the present case, "[i]n part because we conclude, for the reasons expressed in *I.C.I. Americas v. Banks*, 460 S.E.2d 797, 798 n.1 (Ga. App. 1995), that the holding of the Georgia Supreme Court in *Banks v. I.C.I.*, 450 S.E.2d 671 (Ga. 1994), would not apply to the injuries involved in this case. . . .".

Thus the only stated reason for denying appellants' suggestion of rehearing (or hearing) en banc and appellants' petition for rehearing was that the 11th Circuit noted that Georgia law recognizes partial prospectivity, and that therefore *Banks* I would not apply retroactively to the injuries involved in the present case. Based on *Banks* III, that only stated reason is incorrect.

Inasmuch as the Georgia Court of Appeals held that upon retrial a jury would not be allowed to consider whether ICI was liable for punitive damages, the case

was returned to the Georgia Supreme Court for further determination in *Banks* III. In *Banks* III the Georgia Supreme Court made clear that *Banks* I was to be applied retroactively, and at that time fully set forth its explicit application of *this* court's three-prong test as set forth in *Chevron Oil v. Huson*, 404 U.S. 97 (92 SC 349, 30 LEd 2d 296) (1971).

The Georgia Supreme Court in *Banks* III noted that "the language in *Banks* I did not admit of any limitation on the grant of new trial." The Georgia Supreme Court went on to quote *General Motors Corp. v. Rasmussen*, 255 Ga. 544, 545-546(2) (340 S.E.2d 586) (1986) for the proposition that "court rulings that substantially alter the law normally apply retroactively." The Georgia Supreme Court in *Banks* III further went on to note that "[o]ur direction to the Court of Appeals in *Banks* I regarding plaintiffs' entitlement to a new trial clearly reflected our determination that we had considered the purpose and history of product liability law and the inequities that could be created by our holding before ruling that *Banks* I would apply to the parties in that case."

The Georgia Supreme Court in *Banks* III went on to explicitly apply the three-pronged test set forth in *Chevron Oil v. Huson* to this case:

> Balancing the merits and demerits, we find that the purpose and effect of our holding in *Banks* I will be best served by an even application of its holding in the field of product liability law and that retroactive application would further its operation. We find no merit in ICI's arguments that it relied on pre-*Banks* I law when it created and manufactured the rodenticide and thus

> reject ICI's argument that it would be inequitable to hold it liable for a defectively designed product under the standard of conduct set forth in *Banks* I.
>
> Accordingly, under the test in *Flewellen*, supra, the Court of Appeals erred by failing to apply *Banks* I retroactively.

In the petition for writ of certiorari filed by the Thomas' in this case, petitioners asked in their second reason for granting the petition that this court issue the writ of certiorari to reverse the 11th Circuit decision in this case, and certify the retroactivity question to the Georgia Supreme Court for a definitive analysis and decision. In the alternative, petitioners requested that this court directly certify this question to the Georgia Supreme Court for decision. *Banks* III having now determined the retroactivity question in favor of petitioners, this case should be remanded to the 11th Circuit.

A review of the facts in the *Banks v. ICI* case, as more fully set forth in the Court of Appeals' decision, *Banks* II, renders this conclusion even more compelling, when read in conjunction with the analysis set forth by the Supreme Court of Georgia in its opinion reversing the Court of Appeals' decision. The facts, as set forth by the Court of Appeals at page 523 of its decision, showed that:

> Talon-G was packaged in a container with EPA – approved labelling, which displayed warnings cautioning users that it should be kept out of reach of children; that it may be harmful or fatal if swallowed, and that it be stored in its original container in a location inaccessible to children. ICI sold Talon-G only to professional pest control operators. The plaintiffs, the child's parents,

> produced evidence that a pest control company servicing the Boys Club placed the Talon-G in an unmarked, unlabeled container stored in an unlocked cabinet at the Boys Club. The poison was apparently found in the container at the Boys Club by the child, who consumed a quantity of it.

As did petitioners in this case, the plaintiffs in *ICI v. Banks,* brought suit against ICI on counts of negligence and strict liability. There was evidence in *ICI v. Banks* that the products would be misused and that the misuse would be foreseeable to the manufacturers. In the Court of Appeals' opinion in *ICI v. Banks,* at page 524, it is noted that there was evidence that the danger could have been reduced by the addition of ingredients which would cause humans, but not rats, to reject it because it was bitter-tasting, or vomit after ingesting it. In the case at hand, there was evidence regarding Lewis Red Devil Lye and Liquid Fire, that both could have been made safer when they were manufactured, and still do the same job, by creating a formulation with a lower percentage of the undiluted chemicals that would perform the same function and be a much safer formulation. (See petition @ p. 8)

Furthermore, despite ICI's specifically cautioning users to keep this chemical out of the reach of children, warning that it was possibly fatal if swallowed, specifically noting that it should be stored in its original container in a location inaccessible to children, and selling Talon-G only to professional pest control operators, the Supreme Court of Georgia nevertheless granted to plaintiffs in that case a new trial based on its risk-utility

analysis. A new trial was granted despite the intervening negligent act of a pest control company, in placing this Talon-G in an unmarked, unlabeled container stored in an unlocked cabinet at the Boys Club. Petitioners here contend that this result was reached inasmuch as a jury's risk-utility analysis regarding these dangerous chemicals precedes and moots any issue of contributory negligence, failure to read or other intervening proximate cause. The risk of danger and injury posed by these dangerous and volatile chemicals may, in the trier of facts' eyes, outweigh their utility, such that if a jury finds that the chemicals as formulated (or, depending on the facts and the chemicals' properties, in any formulation whatsoever) were simply too dangerous and that the risk of using these chemicals outweighed their utility, that they should never have been sold to the public in the first place. In using the risk-utility analysis, and weighing all of the factors involved, a jury may also find that though the chemicals' utility merits their usage, despite their dangerous nature, that they be manufactured in diluted strength to reduce or eliminate the possibility of explosion, and that therefore the *failure* to use an available alternative safer formulation that would not explode led to the injuries of D.L. Thomas.

This case has to be reanalyzed in light of *Banks* III to apply the risk-utility analysis to this case.

The Georgia Supreme Court in adopting the risk-utility analysis (which it found to be consistent with Georgia law) specifically included a non-exhaustive list of general factors including "the gravity and severity of the danger posed by the design . . . " and "the availability of an effective substitute for the product which meets the

same need but is safer . . . " See *Banks* I footnote 6, page 8. The balancing of these two factors is precisely what a jury must do in this case, and this certainly cannot be a summary judgment question, unless the District Court or the 11th Circuit can somehow find as a matter of law that the utility of a faster, explosive drain cleaner outweighs the risk of catastrophic injury, despite the known availability of safer design alternatives that more slowly clear drains.

Petitioners submit that this is precisely the situation and the analysis that it has argued in this case and in the Suggestion for Rehearing En Banc and is precisely on point. Since the case was decided on motions for summary judgment by respondents, and there is expert opinion testimony that a safer formulation of chemical drain cleaners could be made to perform the same job according to expert Dr. Abraham, it is therefore clearly a jury question in this case as to whether or not the respondents' products were defectively designed and/or inherently dangerous, based on the factors set forth in *Banks* I including the gravity and severity of the danger posed by the design, which in this case was the blindness of D.L. Thomas – a severe injury – and the fact that there is expert testimony of the availability of an effective substitute to the product which meets the same need *but is safer*.

With the Georgia Supreme Court's decision in *Banks* III, the retroactivity question has now been answered in favor of petitioners by holding explicitly that *Banks* I should be applied retroactively, and therefore petitioners ask that this case be reversed or remanded to the 11th Circuit for further consideration consistent with *Banks* III.

For although the 11th Circuit denied appellants' suggestion for rehearing (or hearing) en banc and appellants' petition for rehearing only *in part* based upon footnote 1 of *Banks* II, regarding the retroactivity issue, this was the *only* reason given, and based on *Banks* III, that decision was erroneous.

CONCLUSION

Petitioners therefore request that this court issue the writ of certiorari to the 11th Circuit Court of Appeals, and reverse or remand this case to that court for further consideration in light of *Banks v. ICI Americas* III.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

D. L. THOMAS ET UX. *v.* AMERICAN HOME PRODUCTS, INC ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 95–1826. Decided October 15, 1996

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Banks* v. *ICI Americas, Inc.*, 266 Ga. 607, 469 S. E..2d 171 (1996).

JUSTICE SCALIA, concurring.

Since I have been critical of the Court's excessive use of the GVR mechanism, I think it appropriate to explain why I think it proper to GVR here.

As I described in *Stutson* v. *United States*, 516 U. S. ___, ___ (1996) (SCALIA, J., dissenting), our practice of *granting* certiorari, *vacating* the judgment below, and *remanding* for further proceedings in light of intervening developments apparently began when we first set aside the judgments of state supreme courts to allow those courts to consider the impact of state statutes enacted after their judgments had been entered. *E.g.*, *Missouri ex rel. Wabash R. Co.* v. *Public Serv. Comm'n*, 273 U. S. 126 (1927). By 1945, the practice of vacating state judgments in light of supervening events had become so commonplace that we could describe it as "[a] customary procedure." *State Farm Mut. Automobile Ins. Co.* v. *Duel*, 324 U. S. 154, 161. "Similarly, where a federal court of appeals' decision on a point of state law had been cast in doubt by an intervening state supreme court decision, it became our practice to vacate and

remand so that the question could be decided by judges 'familiar with the intricacies and trends of local law and practice.'" *Stutson*, *supra*, at___ (SCALIA, J., dissenting) (quoting *Huddleston* v. *Dwyer*, 322 U. S. 232, 237 (1944)). See also *Conner* v. *Simler*, 367 U. S. 486 (1961); cf. *Omaha Nat. Bank* v. *Nebraskans for Independent Banking, Inc.*, 426 U. S. 310 (1976) (GVR'ing in light of an intervening state statute).

Thus, the present case falls squarely within our historical use of the GVR mechanism. The Supreme Court of Georgia's decision in *Banks* v. *ICI Americas, Inc.*, 266 Ga. 607, 609–610, 469 S. E. 2d 171, 174 (1996) *(Banks II)*, handed down after the Court of Appeals for the Eleventh Circuit's decision, makes clear that the Eleventh Circuit's interpretation of Georgia law was incorrect. The sequence of events was as follows: After the Court of Appeals had issued its *per curiam* opinion affirming the District Court's entry of summary judgment against petitioners, the Georgia Supreme Court, in *Banks* v. *I. C. I.*, 264 Ga. 732, 450 S. E. 2d 671 (1994) *(Banks I)*, in effect overruled the Georgia case that was the basis for the District Court's holding. Petitioners' petition to the Eleventh Circuit for rehearing was denied, the only explanation given being "that the holding of the Georgia Supreme Court in *[Banks I]* would not apply to the injuries involved in this case" because that holding had no retroactive application. *Thomas* v. *American Home Products, Inc.*, No. 93–9214 (CA11 1996), App. to Pet. for Cert. 28a. Shortly before the present petition for writ of certiorari was filed, the Supreme Court of Georgia held in *Banks II* that *Banks I was* retroactive.

THE CHIEF JUSTICE points out that "[p]etitioners' request for relief meets none of the tests set forth in our Rule 10, 'considerations governing review on writ of certiorari.'" *Post*, at ___. That is certainly so. Of course as this Court's Rule 10 itself makes plain, those tests "neither controll[] nor fully measur[e] the Court's discretion," but rather merely "indicate the character of

the reasons the Court considers" in deciding whether to grant certiorari. More importantly, however, we have never regarded Rule 10, which indicates the general character of reasons for which we will grant *plenary consideration*, as applicable to our practice of GVR'ing. See, *e.g.*, *Lawrence* v. *Chater*, 516 U. S. ___, ___ (1996). Indeed, *most* of the cases in which we exercise our power to GVR plainly do not meet the "tests" set forth in Rule 10. See, *e.g.*, *Schmidt* v. *Espy*, 513 U. S. ___ (1994) (GVR in light of administrative reinterpretations of federal statutes); *Crouse* v. *United States*, 519 U. S. ___ (1996) (GVR in light of *Koon* v. *United States*, 518 U. S. ___ (1996)); *Greater N.O. Broadcasting* v. *United States*, 519 U. S. ___ (1996) (GVR in light of *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. ___ (1996)).

We are not remanding this state-law case, as THE CHIEF JUSTICE suggests, because the Eleventh Circuit failed to prophesy the course that the Supreme Court of Georgia would ultimately take, see *post*, at __, any more than we remand *federal-law* cases in light of intervening decisions of *this* Court because the court of appeals failed adequately to predict how *we* would decide. In both instances, we are vacating the decision below to allow the court of appeals to consider an intervening decision of the court that is the final expositor of a particular body of law—with federal questions, the Supreme Court of the United States, and with questions of Georgia law, the Supreme Court of Georgia. We assuredly would not decline to GVR a case affected by one of our own intervening decisions merely because the case "is of no general importance beyond the interest of the parties." *Post*, at ___. Almost all of our GVR's fit this description—for example, the many cases GVR'd in recent months in light of our decision in *Bailey* v. *United States*, 516 U. S. ___ (1995), *e.g.*, *Cuellar* v. *United States*, 518 U. S. ___ (1996). I can think of no possible reason why we would routinely GVR "unimportant" cases in light of our own opinions but not in light of state supreme court opinions, unless, of course, we

have less regard for the federal courts' correct application of state law than for their correct application of federal law—an attitude we should certainly not acknowledge.

I do not share THE CHIEF JUSTICE's fear that our action today will flood the Court with applications to review questions of state law by petitioners "unhappy" with the result below. *Post*, at ___. As I have described, today's action breaks no new ground but merely continues a longstanding practice. It does not involve us in an intensive review of state law, but requires only the simple determination (rarely available) that the federal-court decision on state law appears to contradict a *subsequent* decision of the state supreme court. When the conflict is of "far more dubious . . . relevance" than the one at issue here, *post*, at ___, we can and should exercise our discretion to deny the petition for writ of certiorari.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE BREYER joins, dissenting.

This is a personal-injury, products-liability case which is in the federal court system by virtue of diversity of citizenship. The Court of Appeals for the Eleventh Circuit affirmed a grant of summary judgment against petitioners by the district court, and petitioners have sought review here. In a supplemental brief filed after their petition, they have called attention to the decision of the Supreme Court of Georgia, *Banks* v. *ICI Americas, Inc.*, 266 Ga. 607, 469 S.E.2d 171, 174 (1996), handed down on April 29, 1966, two-and-one half months after the Court of Appeals denied rehearing.

Petitioners' request for relief meets none of the tests set forth in our Rule 10, "considerations governing review on writ of certiorari." The first of these considerations, as outlined in the Rule, is if a court of appeals has rendered a decision in conflict with the decision of another United States court of appeals, or has decided a federal question in a way which conflicts with the

decision of a state court of last resort, or "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." There is clearly no conflict between courts of appeals in this case, nor does petitioner claim that the Court of Appeals for the Eleventh Circuit has decided a federal question in a way which conflicts with a state court of last resort. Nor could it be claimed that the Court of Appeals departed from the accepted and usual course of judicial proceedings, since the decision of the Supreme Court of Georgia in *Banks* was handed down more than two months after the Court of Appeals denied rehearing.

The other considerations governing review of certiorari likewise have no application to this case. The Court of Appeals here has not decided an important question of federal law which should be settled by this Court, or decided a federal question in a way that conflicts with applicable decisions of this Court.

Thus, one must ask, why is this Court intervening to vacate and remand this case to the Court of Appeals? The Court's answer, I suspect, would be that *Banks* suggests that the Court of Appeals may have wrongly decided an issue of Georgia law in the case. But this Court's function, generally speaking, is not to correct federal courts' misapplications of state law, except, perhaps, in exceptional cases with importance beyond the parties' particular dispute. This is not such an exceptional case; there is no reason to think that the Eleventh Circuit will not apply *Banks* faithfully in future cases. Nor is this a case which we must, for one reason or another, decide on the merits and where the views of another court as to the intervening state law decision might be useful, or a case where certiorari has already been granted and the case argued on the merits. See *Stutson* v. *United States*, ___ U. S. ___, 116 S. Ct. 611 (1996) (Rehnquist, C.J., concurring in No. 94–9323 and dissenting in No. 94–8988) (citing and distinguishing cases).

To be sure, there is a "special deference owed to state law and state courts in our system of federalism," *Stutson*, *supra*, at 613 (Scalia, J., dissenting), but by failing to predict the Georgia Supreme Court's *Banks* decision the Eleventh Circuit has in no way slighted the State of Georgia or upset the balance of our federalism. I do not believe that this Court has a stake in the correctness of discrete state-law decisions by federal courts, nor, in such cases, any "obligat[ion] to weigh justice among contesting parties." *Stutson*, *supra*, at 611 (Rehnquist, J., concurring in No. 94–9323 and dissenting in No. 94–8988) (quoting 2 H. Pringle, The Life and Times of William Howard Taft 997–998 (1939)).

I trust I am correct in thinking that the Court would not grant certiorari in this case to decide whether or not the decision of the Supreme Court of Georgia in *Banks* requires a different outcome than that reached below. I am equally sanguine that the Court would not summarily reverse the decision of the Court of Appeals on a question of Georgia law, a subject about which that court knows a great deal more than we do. Because we are only granting, vacating, and remanding to the Court of Appeals, the Court's action may seem more palatable here. But I believe it is just as incorrect as would be our deciding the merits of a question of state law in some other diversity case which is of no general importance beyond the interest of the parties. The decision to vacate and remand in this case doubtless seems an easy one to those who join it; the Court of Appeals specifically mentioned the retroactivity issue later decided in *Banks* in its opinion denying rehearing, and respondent has filed no response to petitioners' supplemental brief. But today's action will encourage numerous similar requests from other parties unhappy with the decision of a court of appeals in their diversity cases, and the relevance of the intervening factors which they urge may be far more dubious than is the relevance of *Banks* to this case.

Finally, requiring the Court of Appeals to delve into the facts and law of the case again, months after it denied rehearing, is not without cost. The typical active judge of the Court of Appeals for the Eleventh Circuit participates in somewhere between 150 and 200 panel decisions each year. For us to require a busy court to once more revisit the merits of this state law dispute gives these petitioners more of the time and resources of the federal judicial system than they deserve.

I dissent from the Court's disposition of this case.